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THE CANONICAL STATUS OF PARISHES HELD BY RELIGIOUS IN THE UNITED STATES *

PART I **

I. Religious Parishes

THE Church of Christ is like a net let down into the sea, and behold it draweth up all manners of fish within its confines. The Church of today has room within its ample folds for the whites and the blacks, the yellows and the browns and the redskins of the forests. The Church embraces all manners of philosophers and fools, rich men and poor men, old sages and bashful children, the keen and the dull, the scholarly and the obtuse.

Technically, of course, the Catholic Faith is an organization and also an organism. It is a living, breathing, vitally moving thing. It certainly is not dead, sterile, unbending, immobile or inflexible. The Church may be intransigent, but she is never stubborn. She did not need any Horace to tell her:

> Be not the first by whom the new is tried,
> Nor yet the last to lay the old aside.

Adaptability, adjustability, accessibility are her great human characteristics and they have enabled her to fit into a society

* Paper presented by the Reverend Eugene A. Dooley, O.M.I., J.C.D., Immaculate Conception Church, Lowell, Massachusetts, at the Annual National Meeting of The Canon Law Society of America, held October 12-13, 1954, at Boston, Mass.

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ruled by Caesars in one land, by premiers in another, by kings in a third, and by Presidents in a fourth.

The Church is too wise and too sage to make the mistake of rigidly forcing all men and women to fit within narrow slots of her own making and doing. The tyrant Procrustes would toss his victim onto a bed, and then he would make the writhing wretch fit the pallet. If he were too short, his limbs were stretched until they fitted the bed; and if the victim were too long, his legs were sawed off until they fitted the bed too. The Church is pliable and elastic and yielding, never cruel enough to make men fit the Procustean bed of the old fable; and on the

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The Sources and Bibliography: This article is based on many sources and much documentation, and the writer owes a debt of gratitude to many prominent scholars for their advice and assistance. Special thanks should go to the Rev. Timothy Lynch, M.S.SS.T., of Winchester, Va.; Rev. Pierre-M. Poisson, C.S.C., of Montreal, P.Q.; Rev. Mariner T. Smith, O.P., formerly of Washington, D.C., but now in Rome; Rev. Frederick Sackett, O.M.I., of San Antonio, Texas: Rev. Michael Harding, O.F.M., of New York City; Rev. Thomas R. Gallagher, O.F., of Washington, D.C. Their generous and gracious advice, as well as their supplying of contracts and other agreements that have come through the august channels of the Holy See, has made it possible to speak and write with some authority.

Other works have been consulted in detail, though this field of study has been overlooked or neglected by many standard texts. Chief among the valuable works on this subject are the following:

Bondini, A., O.M.Conv., "Circa il Rendiconto di Parocco Religioso al Vescovo," *Il Monitore Ecclesiastico*, XXXVIII (1926), 335-347.

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Delgado, Conrado, O.F.M., *De Relationibus inter Parochum Religiosum et eius Superiores Regulares*, Roma, 1940.

Goyeneche, S., C.M.F., "Consultationes," *Commentarium pro Religiosis*, XLI (1929); XLVII (1935); L (1938), 168.

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Lynch, Timothy, M.S.SS.T., *Contracts between Bishops and Religious Congregations*, The Catholic University of America Canon Law Studies, n. 239, Washington, D.C.: The Catholic University of America Press, 1946.

Mundy, T., *The Union of Parishes*, The Catholic University of America Canon Law Studies, n. 204, Washington, D.C.: The Catholic University of America Press, 1945.

Vromant, G., C.I.C.M., "De Regimine Paroeciarum et Quasiparoeciarum Religiosis Concreditarum" *Jus Pontificium*, XIII (1933), 274.

other hand not feeble and timid and vacillating on matters of eternal truth and verity. Men dare not twist the Church to make it suit themselves; rather should they twist themselves to make them fit the truth that God's Church imparts and propounds.

Within the ranks of the clerics in the Church there is a grand division between the secular clergy and the religious clergy. The religious clergy have banded themselves into societies or Orders or Congregations where they have assumed certain specific obligations or Vows, and they live in such communities under the direction of their proper religious superiors. Some of them have pronounced Solemn Vows, and still others have made Simple Vows or Promises that bind their members to perform certain specific duties of charity or zeal.

The members of the secular clergy, on the other hand, have their own specific Superior in the local Ordinary where they are stationed. These men do not take any of the Vows proper to the religious life; and if this on the one hand seems to make their state less holy than the religious state, on the other hand it certainly leaves them much more free to perform works of charity and zeal and apostolic growth which members of communities could not perform by reason of their duties of community life and community discipline.

Both seculars and religious have very definite and specific tasks to be done for the good of the Church and the world, and the present Holy Father has peacefully laid at rest many of the old controversies of pre-eminence among them when he gently reminded them both that each has its proper sphere of influence, that each needs the other for the full and entire completion of true apostolic work, and that neither excels the other in virtue or prestige or glory. The enemies of the Church would love to see the seeds of discord take deep root, and the judicious would indeed grieve if those who are pledged to fight the world, the flesh and the devil would lose sight of the real issue and devote their energies and their time to

fighting or quibbling or wrangling with each other. Nothing could bring greater pleasure to the foes of God and the Faith. Nothing on the other hand could bring greater confusion and dismay to those same evil forces than a solid and united front among the servants of the Supreme Pontiff. In that noble crusade all good men will join hands.

The religious history of the Church in America cannot be written without large and glowing mention of the religious Orders and Societies whose men and women plowed the furrows of uncharted seas, drew up their skiffs on stony shores and then proceeded to carve parishes, dioceses and even archdioceses out of the forest primeval. The first white man to gaze on Niagara Falls was Fr. Hennepin the Recollect, and the names of Jogues, Breboeuf, Chabanel, De Smet, Lacombe, Chirouse were written in letters of gold in the stories of the Indian tribes of this land and Canada. These men were pioneers and even empire builders, and they have erected a citadel of the Faith in this New World which ranks among the greatest missionary endeavors of all history.

II. The Anomaly of Religious Priests

There are more than 527,000 priests in the world, and more than 271,000 (52% of them) belong to religious institutes. Many of them are in the teaching fields, but many more are attached to parishes and missions, doing the parochial work among the laity. Their parishes have the same societies and sodalities and confraternities as all other churches, and in outward ministration there is a direct similarity to every other parish being conducted by secular priests. They are cooperators in all the works of the diocese, and they are colleagues, not competitors or rivals. A misguided person might say that their first allegiance is to their community rather than to their parish or diocese, but a better informed person would prefer to say that they are pledged to work for God and the Church in that area where their religious Vow of Obedience has placed them. There may be some conflicts and shady zones affecting

their ownership of property by personal title, and there are compulsory laws that oblige them to a common home and a common table, but to all outward appearance the parish managed by Religious is no different from the parish held by the secular priests who are immediately subject to the local Ordinary. Our present Holy Father stated in the Convention to all Religious at Rome on December 8, 1950 (Grail publication from St. Meinrad in Indiana) these words:

> Neither branch of the clergy (religious or secular) can hold any prerogative by divine authority, since that same divine authority prefers neither one to the other. There is no doubt that by divine decree every priest whether secular or religious must carry out his duties in such a way as to be a helper of and subject to his Bishop. This divine decree which for the rest has always been in ecclesiastical tradition now finds clear expression in the Code of Canon Law (canon 626-631 and 454, § 5) where one finds the legislation on religious who are local pastors or local Ordinaries. Furthermore it is no rare thing for the entire clergy including the Bishop of certain missionary countries to be religious. Let no one think that such a condition is altogether extraordinary or unaccustomed, or that it is only temporary, or that as soon as possible this sacred charge must be entrusted to the secular clergy.

If some religious priest had written such words from the safe sanctuary of his monastery cell, he might have been subjected to a torrent of contradiction. He would have been hailed as an extremist or perhaps a visionary for maintaining such ideas, and even though his antagonists could not point to any specific book or law or canon to sustain them, they could surely find a vast vocal army of adherents whom they could summon to their aid to refute such outlandish and chauvinistic notions.

But now the die is cast. The Holy Father has spoken, and the words of the Pontiff are merely good law, sound judgment and magnificent equity. Religious are not to be packed away off into laity-proof compartments; rather they are to permeate and infiltrate their diocese and parishes with the sound

principles of moral and ascetic living. And they are to do this by law, not merely by privilege.

Maybe in days gone by there were times when farsighted pioneer priests and Bishops might have been more canonical. A legalist of today would yearn for better canonists in the early days of this country, but a casual history of even the highlights of immigration and its impact on America will convince a man that there was greater need of zealous apostles than of armchair canonists. If this sounds like a declaration of treason at a Canon Law convention, then let it be said to the credit of the pioneers of America that the spread of the true Faith came first and foremost, and rigid canonical procedure came next. The substance was worth more than the accidents.

This does not mean that there was total disregard for proper canonical procedure in early pioneer days of America. The principle of jurisdiction was always safeguarded, and those who have read the masterly *Life and Times of John Carroll* are familiar with the many tangled controversies he had with those vagrant and irregular clerics who drifted into this land from across the ocean and then desired to set up churches and congregations in this New World. The true priests instinctively obeyed their true prelate, and the wanderer almost instinctively walked the crooked paths of personal ambition, reckless freedom and haughty disobedience.

Many a prelate knocked humbly at the doors of religious Institutes beseeching assistance, and many an Institute saw (like St. Paul) the people calling them across the deep waters of the Atlantic Ocean. The thin-sized history of almost every community with roots in America will point to such lines as "Bishop So-and-so came to us and begged our Sisters or priests to take up work in his diocese in such-an-such a year," and these things are only the surface indication of apostolic prelates seeking out strong and willing hands to share the burdens of the work in the growing America.

This point is rather important, not only from a social and historical point of view, but also from the legal aspect too.

Legalists are arising now who desire to undermine or overthrow the status of these establishments. More often are the words spoken than written, and hence it is difficult to point a finger at a solidified legal argument that is reduced to print. Some assert, for instance, that in the year 1910 (when the United States ceased to be missionary land, and passed over to the regular and ordinary jurisdiction of the Church) this old legal status of religious-held was wiped out entirely, because previous arrangements had been made in view of the existing missionary conditions.

Such a general brushing-away of old contracts is amazing, to say the least, and after a preliminary statement "*Quod gratis asseritur gratis negatur*", a multitude of accessory statements floods into mind. The Church does not with one fell swoop cavalierly wipe out the validity of a contract that has seen years of valiant and rugged service. The Institute has a "*ius quaesitum*" and a presumption of validity (and in many cases it even has a document or manuscript to prove it) in its favor, and these things cannot be wiped out by a bold assertion.

It is a sound principle of law that legislation binds "*ex nunc*" and not "*ex tunc*" unless its retroactivity is explicitly and bluntly and unquestionably stated in the law itself. New foundations have to made according to the new rules laid down, but the old foundations are to be judged by the rules in force at the time of their foundation. When the Church makes important changes in legislation, it states them bluntly. It does not insinuate them; instead it openly declares them.

III. The Nature of Contracts

The crisp definition of a contract tells that it is "the meeting of minds." Two or more minds meet and discuss terms, and an agreement concerning deeds or real property is made. Two persons make a mutual promise to work together, and a contract is born. Sometimes one person furnishes the labor and the second furnishes the capital or the know-how . . . and

another contract is born. Books galore have been written on this fascinating and expansive subject, and there is hardly a feature of the human mind that has not been thoroughly exhausted by the ramifications of intention, scope of material, the presence of fraud both accidental and substantial, and the devious ways and means of escaping the sanctions that contracts bring with them.

Contracts may be either verbal or written, and both of them are perfectly valid and true legal entities. The verbal contracts are just as real and valid as the written contracts, but they labor under the obvious defect of not having a lasting substance in reality. "*Verba volant sed scripta manent.*" Words have a sad way of flying off into the wild blue yonder, whereas documents have a stubborn and persistent habit of perduring and persevering. There is nothing so stubborn as a fact, and there is nothing so final as a document signed, stamped, and sealed. Such a thing usually means the end of controversy, because it is a lasting and true statement of the minds of persons as they were joined together.

It is undoubtedly true that laws prefer contracts to be written rather than verbal or oral. "*Quod non est in scriptis non est in mundo.*" People have a way of forgetting what they said or promised, and the world would indeed be in a sad legal state if the codes of laws had not set up strict requirements for the enforcing of terms in contracts. This is the reason why some contracts must be in writing, lest there be peril of too much subjectivism and wrangling over forgotten details of bygone oral contracts.

The law does not state that oral contracts are no good. Rather does the law state that contracts usually will not receive legal protection unless they are written and signed. It would be too much to expect that laws would protect all oral contracts, because too often such things could resolve themselves into a "he did" and "he didn't" sort of debate.

The law loves documents and witnesses. From such things are deduced clear proof and incontrovertible testimony. Some-

times there are reluctant witnesses, or hostile witnesses or evasive witnesses, to be sure, just as at other times there will be suspicious documents with questionable text and dubious phrases or turns of thought. But they are witnesses and documents, just the same, and they are infinitely better in court than a case which is apparently based on truth and justice without a shred of paper or witness or evidence to sustain its claims and demands.

The law, then, does not state that all verbal contracts are invalid, and indeed the natural law would insist that man who makes a solemn promise is bound by the virtue of fidelity and truth and justice and honesty to keep his contract. An Irish bull says, "A verbal contract is not worth the paper that it's written on," but a theologian would be compelled to make solemn protest against the insinuations of this witticism by insisting that a verbal contract is a real contract with its force resting on the natural law engrained in the hearts of men. No law ever said that a person had to be literate to make or enter a contract, and everyone must realize that contracts were in existence long before the A, B, C's were in the common possession of mankind.

It is as though the law stated this: "We will protect all contracts that are written and existing, but we cannot protect or afford sanction to any contracts that are merely verbal. We do not deny that they exist or have force. We admit that they are true contracts, but we cannot protect them. All we can do is guarantee the protection of our courts to those written contracts wherein the parties have made certain specific property rights. Verbal and oral contracts may be all very good, but they have no evident or real entity, and therefore we entrust them to the forum of conscience rather than to the forum of our courts."

Verbal contracts, therefore, suffer from several sources but they have no weakness from the natural law. The mighty force of conscience is still at work in the world of religion and ethics, and the man who would spurn the value of a verbal

contract is spurning by that very deed the moral law that is the basis for all contacts between mankind. There is enough charlatanry in the world already, without adding to it the pietistic notion that verbal contracts are no good at all in any forum save the forum of conscience. That forum may not have its bailiffs or its penitentiaries but it has God on its side, and it has conscience and honor and virtue as its dependable props. Verbal contracts are in good company to be sure.

A legitimate question might be introduced here, and its importance is unquestionable. The question is this: "What if anything could or should be done now in order to make less confused the status of parishes held by Religious in which at the beginning there was no definite written agreement between the Ordinary and the Religious Community?"

It goes without saying that if there was a written agreement at the beginning, then the ordinary course of justice will dictate the course of action. There may be times when this will hamper or restrict the Religious Community in a desired expansion of work (such as in the case where the Community would be bound to keep a certain number of priests in a certain parish, even though the Community might desire to employ their services in another field of labor), and then on the other hand there might be situations where the Ordinary might desire to find places for the new priests being ordained from his seminary. Neither party to the original contract may abolish that agreement at his own desire, but there is always recourse to the Sacred Congregation of the Council or the Sacred Congregation of Religious by either party desirous of release. Neither one may act alone or independently of the other, and it would be absurd or perhaps even outrageous to assert that either one could blithely walk out on the original contract. There is a right and a wrong way to do everything, and even such a contract as this has its proper procedure and also its improper procedure as well.

Concerning the matter of those ancient agreements between Bishops and Religious, when no written agreements

are on hand, there is greater difficulty and some necessity for good legal procedure. In the first place, it ought to be stated that the written or spoken items which call these agreements by the ephemeral term of "implied contracts" are really a misnomer. There are such things as correlative terms in the English language, if it may be stated here without seeming to be too juvenile or pedantic, and there may be times when even an expert may forget basic notions. Thus a contract may be either written or verbal (oral), and those two terms are correlative because they are mutually self-exclusive. Then again a contract may be explicit or implicit, and right there some difficulties could arise, because some pedantic souls could arise to state that there is no such thing as an "implicit" contract. Perhaps they are laboring under semantic difficulties, because life itself presents many situations where contracts are "implied" or "implicit". Such things are capable of much misunderstanding and misinterpretation, to be sure, because they often dwell in the realm of subjective meaning, personal interpretation or even erroneous statement of terms and obligations, but it does seem impossible for a person to state apodictically that there "ain't no sech animal" as an implied contract. Two minds can meet either on paper or in words, and there is nothing to prevent a real contract from existing even though there may be insuperable difficulties in establishing proof for the things agreed upon.

The point that is even more important than this, however, is that a contract does not immediately become known as an "implied" contract just because there is no document at hand to prove its terms. Everyone knows that St. John the Baptist baptized Our Lord, but no one has a baptismal certificate to prove it; and who ever saw the certificate of marriage between Our Lady and St. Joseph? There is a great difference between the truth of a thing and the proof for that thing. A thing that is true remains true even though it cannot be proven, because truth is one thing, whereas proof is another.

In the early days of the colonization of America there were

many men of Religious Communities who accepted work in dioceses at the invitation of local and hard-pressed Bishops who were craving for assistance and co-wokers to assist them in the care of the infant Church. Religious "were invited" to take up work in many dioceses under what has been facetiously called "no *do* and no *des*" contracts. In other words they came into a territory and were commissioned and authorized to do priestly and parochial work. The Bishop gave them no money or promises of financial support, and the Religious undertook their tasks with that explicit idea in mind.

Perhaps it is a rare community that can point a blunt and forceful finger at an explicit contract signed with some prelate of bygone days, because as a rule these transactions were agreements amicably and even eagerly entered upon by zealous Religious and soul-minded Bishops. It seems wrong to consign all these agreements and categories to the realm of "implied contracts" when actually they were explicit arrangements and true "meetings of minds." An explicit arrangement is not an implied contract. It is often true that many details are implied even in explicit contracts, but substantially the contract remains real and true and explicit even though there are some wavering doubts about minor or even major points contained therein. The best-drawn contract may contain some cloudy sections, and any lawyer knows this well. Cloudy contracts have supported many a legalist in luxury for years, and those contracts were explicit too.

IV. The Notion of Perpetuity in Contracts

There is a distinction between things that are eternal and and things that are perpetual. Eternity had no beginning and it will have no end, but perpetuity had a beginning though it will not have an ending.

Religious persons pronounce Perpetual Vows, and they bind themselves for life to follow the evangelical counsels in accordance with the rules and Constitutions of their chosen community. A canonist is realistic enough to know that there are situations where the individual Religious as well as

the whole Church itself would be bettered if some such persons were released from their Perpetual Vows, and accordingly there is in Canon Law and in religious discipline a procedure whereby such release and dispensation may be procured. A petition is made by the subject himself, and this is forwarded to the Sacred Congregation of Religious, usually by the Community's Procurator to the Holy See. Legitimate reasons for the dispensation must be alleged, and the S. C. of Religious will make the final decision, usually based on the fact that for the good of the soul and the conscience of the petitioner, as well as for the benefit of the Church, the Holy Father does not wish to consider this person any longer tied and bound by his Vows. This is the fixed power of binding and loosing as mentioned in the Gospels. Those Vows were freely made and freely and deliberately contracted, but a substantial change in the situation has occurred, and now a more mature decision is being reached, and the obligations are suspended and even wiped out.

Some persons may argue that this right to nullify the force of Vows is a virtual admission by the Church that all Vows are basically temporary, inasmuch as they can be wiped out by a later decision. In a way there is some shadow of truth in this statement, but the shadow must not be mistaken for the real thing. Even the Church herself distinguishes between Vows that are Temporary and those that are Perpetual, and she never works on the principle that they are all Temporal because they may all be released and dispensed. The dispensations are exceptional things, unusual procedures based on sets of unusual facts and circumstances, and it would be wrong to think that the exceptions are more common than the rule itself. Contracts between Bishops and Religious Institutes often mention "perpetuity."

Nowadays it is most wise to insert in all contracts concerning a parish some idea or notion of the time during which the contract shall run. Some contracts between Bishops and Religious have explicit terms that are eminently satisfying

because they are cleancut and open to no question. If a parish is committed to Religious for the space of 25 years or 50 years there is definite value in such specific terms because both parties enter into such an agreement with clear knowledge of the important details.

In days gone past however, and this means before the Code as well as in missionary times when dioceses were not yet established, there was often not the slightest mention of the time element. Bishops and Religious exchanged pacts of assistance, and the Religious undertook the spiritual administration of a parish or an area, without any verbal or written mention of the duration of time in which the contract would run.

It seems easier to presuppose perpetuity in such contracts than a mere limited-time arrangement. Both the Bishops and the Religious had something to gain as well as often something to lose, and the mutual pact whereby the Religious undertook to care for the spiritual needs of a parish bound them to supply the priests, confessors and curates necessary for the full maintenance of the various works among the faithful. The acceptance of a parish by a religious Community is a very important deed, not taken lightly and certainly not done in moments of rashness. If a religious Community stands to gain from such a contract (as, for instance, in gaining accessibility to a field for vocations), it also stands to suffer some disadvantage in being compelled to keep priests in a definite and selected spot even at a time when their usefulness in other places might be enhanced and increased. From the very notion of such a contract the service of the people and the faithful is enlarged and increased, and ultimately that is the basic reason why the Bishop enlists the aid of these religious in parishes. The *bonum fidelium* is the motivating cause, and it is a term of encouragement for those who have done rightly in this matter, just as it ought to be a term of stern reproach for those who have disregarded it. Contracts between Bishops and Religious ought to have

this *bonum fidelium* always in mind, because it really is the motivating cause for which such alliances are formed. Bishops and Religious ought to be collaborators rather than competitors, and it would be unspeakable if the good of one party should be preferred to the *bonum fidelium*. Some deeds are wrong, some others are blunders, but still others are tragedies because the Church and souls suffer while some small soul chuckles at its own gain and profit. Some victories are not worth winning.

The notion of perpetuity in contracts presents some fascinating ideas and considerations. If two men sit at a table and enter into an agreement, without mentioning a word of the extent of time during which their agreement will run, the natural supposition would be that they intended the contract to run indefinitely. If they had intended a time limitation in their bargaining, that notion would in all likelihood have been expressed in specific terms, because the time element would have been a highly important feature of their mutual dealings. By the very fact that they omitted this conditioning clause or feature, they may be presumed to have intended that their contract would run on and on and on. When time is important, then time is stressed; when time is not considered important, then time limitation is ignored and omitted.

There is among some canonists the notion that the Holy See is completely opposed to contracts "*in perpetuum*." This is an opinion often spoken rather than written, and a rather diligent search of documents and archives has unearthed nothing that will corroborate the idea. As a matter of fact, some Religious Communities have explicit contracts with local Bishops and the words "*in perpetuum*" are explicitly stated therein, and they have been approved by the proper channels at the Holy See. "*Contra factum non valet argumentum.*" Some canonists have the idea that the words "*ad nutum Sanctae Sedis*" are preferable to the words "*in perpetuum*", but apart from the rather pedantic fact that this is only a hassle over the technical wording, there is also the obvious

truth that they could both amount to practically the same thing in the end. Even the words "*in perpetuum*" do not and could not exclude obedience to the wish and desire of the Holy See. If the Holy See speaks, then the cause is finished, because the nod of the Vatican is law for the subordinates. Every good soldier follows his general.

As a matter of fact, one religious Congregation has drawn up a special schema at the General House in Rome for distribution to the Major Superiors in all the farflung countries of the world, and it contains specific instructions and explicit formulae to be used in the formation of contracts with local Ordinaries. Many a prelate in faraway lands is deeply grateful for the canonical assistance rendered by this *pagella*, because it contains material familiar to the Community (which has made similar contracts in many other lands and dioceses), whereas the Ordinary approaches such a tangled canonical matter with vague notions and cloudy ideas. It is interesting to note that this *pagella* furnishes patterns and formulae, and it uses the term "*In perpetuum ad nutum Sanctae Sedis.*" A purist in literature might say that this is rank tautology, but the canonist is grateful nevertheless for the clarification of the idea. The time element is not fixed with the legendary rigidity of the laws of the Medes and the Persians, to be sure, because it has avenues for canonical escape or withdrawal, but it surely manifests the intention of setting up a pact that is not ephemeral, casual, transitory or temporary. This is not a weakness but rather a great benefit, because both parties are protected and sustained by the force of its wording and nature.

V. Contracting Power Before the Code

Religious Congregations professing simple vows received the full approval and recognition only in the 18th century, and there is a series of decisions from the S. C. of Bishops and Regulars which prove that the Holy See wished them to obey all the laws in force prior to their time, especially in the matter of making contracts and agreements.

On Oct. 15, 1652, Pope Innocent X issued the Constitution "*Instaurandae*" (*Fontes*, n. 233) and this revived the older papal Constitution of Boniface VIII "*Cum ex eo*", which had absolutely prohibited religious institutes from setting up new houses of any kind without the explicit permission of the Holy See. The Constitution "*Quoniam*" of Clement VIII was also renewed, and this was sweeping in its rulings. Violators of the rules were punished by *ipso facto* deprivation of their office and dignities, the loss of active and passive voice in elections and the perpetual incapacity of holding any office in the future. Incidentally the same Constitution of Clement VIII also restricted the powers of Bishops by telling them they had to consult with the religious superiors of houses already erected and in operation, in order that the new foundation might not be located so close in the vicinity that it might harm houses already open and functioning. Pope Gregory XV in the Constitution "*Cum Alias*" of August 22, 1772 went even further into this matter, and insisted that the word "vicinity" indicated a maximum distance of 4000 paces.

The Council of Trent had declared (sess. XXV, *de Regularibus*, c. 3) that a religious institute could erect a house only when it had the permission of the local Ordinary. That meant a religious Institute needed permission of the Holy See (from the Constitution of Innocent X) and the permission of the local Bishop. There was great discussion of this matter (based on the question whether a local Bishop could refuse to give what the Holy See had allowed), but Benedict XIV declared unmistakably that both permissions were necessary. (*De Synodo Diocesano*, I, lib. 9, n. 9).

The S. C. of Bishops and Regulars had to defend this dual permission by stating that two permissions were required, despite assertions made to the effect that privileges had been granted to the contrary. On May 8, 1881, Pope Leo XIII confirmed this practice by demanding that both episcopal as well as papal permission be sought and obtained. This was in the Constitution "*Romani Pontifices*".

The Holy See was very insistent on binding the Congregations to obtain permission of the Bishop and the proper Roman Congregation before entering into a stable relationship with a diocese, and there are many provisions made by the S. C. of Bishops and Regulars concerning the duty of Congregations to have chapter members or consultors who would be the advisors to the Supreme Moderator of the Community. (Bizzari, *Collectanea*, pp. 779, 781, 789, 790.) The *Normae* of the S. C. for Bishops and Regulars (*Normae* of 1901, nn. 13, 15) demanded that this council or chapter give by a decisive vote its approval of all contracts entered into by the Community for the welfare of the Institute. On July 30, 1909 the S. C. of Religious sent out a supplementary instruction, commanding Institutes that did not have such councils to establish them within 3 months.

The making of contracts by a Community it a serious business, and the pressure is on the administration to see that all things are in order. A person might push this situation to laughable extremes, of course, if he instituted a search for the Roman permission granted Father Jogues, S.J. or Father Chirouse, O.M.I. or Father Serra, O.F.M. when they went about their work of setting up churches and missions. The Indians of the plains and the Esquimaux of the far North in Hudson's Bay could not wait until documents had arrived from Rome, signed and sealed. Masses had to be said, sermons preached, babies baptized, converts instructed, and the substantial part of the Faith was more important than the accidental part which is the legal ways-and-means.

Legalists may smile at the expeditious manner with which missionaries set up their posts for work among natives and aborigines, but they are compelled by the force of facts to know that the missionaries did not put in an appearance on foreign shores until they had been properly commissioned and sent by legal Superiors acting with the blessing of Rome and the Propaganda. "No man preaches unless he be sent," and these men were sent by the spirit and letter of the Church.

A parallel may be found perhaps in the situations that many chaplains encountered in the recent World Wars, when they found themselves on foreign soil and in acute need of supplies and appointments for their religious services. Several chaplains erected Stations of the Cross for the Good Friday services in the jungles of Guadalcanal and New Guinea, and they gathered great crowds of soldiers for the Holy Week services, not the least perturbed by the legal fact that the stations had been invalidly erected and blessed.

There is such a thing as *epikeia*, and it has its own way of rambling through life, smoothing the way for all legalistic difficulties and roadblocks. The more a man uses *epikeia*, the poorer the theologian he is, because he is thinking in terms of exceptions rather than in terms of rules; but there is also a very dreary state for a man who never uses *epikeia*, because he tends to become too formalistic, rigid and unbending, more content with the law than with reality, more interested in what the book says than in what people do. A great and large-minded soul will seize on the fleeting moment to do the great deed, and a small-minded person will be frittering away valuable time by amassing dreary details of the past without concerning himself with the pressing and immediate needs of the moment.

The Catholic Faith has always been one that adhered closely to the Chair of Peter and to the centre of all authority. History records the fact that St. Patrick went to the Pope for his permission to go back and work among the Druids of the Emerald Isle. The Saint of Erin was not merely a casual or enthusiastic do-gooder at work in his favored spot; rather he was a Church-sent missionary with an apostolic mandate. He had a right to be in Ireland because he had canonical permission from Pope Celestine to be there. That document gave him all the apostolic powers he needed for the task of consolidating the Faith in a land that was ready and yearning for it.

The Church in the United States owes a tremendous debt to the religious Orders and Congregations that manned the front

line trenches in the days when a wilderness was being changed into a cultured civilization. Even in the days of the American Revolution, the priests here were under the ecclesiastical jurisdiction of prelates, at first in England and later in this very land itself. Archbishop Troy of England was the ecclesiastical prelate who had the jurisdiction over the early church in the Colonies along the Atlantic seaboard, and this status was changed later when the illustrious and priestly John Carroll took over the reign of authority and guided the infant Church in a masterly and jurisprudential fashion. Peter Guilday in his monumental "Life of John Carroll" speaks of the havoc and confusion wrought by several wandering priests, irregulars and misfits in Europe and later misfits in America, who came to this land and plagued the Church authorities for years by their vagrant wanderings and their impudent assuming of the powers of jurisdiction in the early days of the Church in America.

The Church has always preserved and valiantly defended the idea that jurisdiction is not something seized but rather something granted and conceded by higher authority to a worker who is bound by ties of obedience and loyalty to the centre of all true authorities.

VI. The Proper Way to Consign Parishes to Religious

In America common idioms often combine notes that should be kept strictly separate. The word "parish" for instance, is capable of many combinations of ideas, and it might be advisable and preferable to use it cautiously, lest there be different ideas of what it contains.

The Holy See is very reluctant concerning the transfer of a secular Church Building to a religious Community, but the same rigorous attitude does not apply toward the transfer of a rectory or a parochial residence. A local Ordinary may have need of clerical assistants, and he may seek the aid of

some religious Community to take over the work of a parish in a particular area. He may contract with them to administer the spiritual and material wants of the area for a definite number of years, or he may desire to have these religious as his assistants *in perpetuum*. The specific understanding between the Bishop and the Religious is a matter of record, because such an important transaction as this must necessarily be written and recorded with all the canonical forms and sanctions. One might say with practical certainty that most of the churches in the United States today are rather the property of the diocese than of the religious Community that administers them. To all purposes they are the Bishop's churches, managed by religious priests and pastors. The Bishop holds the deeds, and the Religious hold title to the care of the parish and people. This is often a happy if not an ideal arrangement, and it is known now that the Holy See willingly grants "regularizing" to those situations where Religious were in possession of a parish for a great number of years, even though the original documents cannot be found, or even moreover in cases the requisite permissions may have been overlooked. It is known too that the Holy See is not averse to granting permission to religious to accept a new parish just being set up. There is understandable reluctance on the part of the Sacred Congregation toward replacing secular priests in a parish with religious priests, and the Holy See inquires very carefully into the precise reasons for such an unusual move as this.

Let it be remembered at the outset that in America the Apostolic Delegate has the faculty (n. 48) to allow local Ordinaries the right to entrust temporarily a parish to a religious Community whenever there is a shortage of diocesan priests. This is a wonderful convenience for an Ordinary, and it takes much of the aura of mystery away from the transaction.

It seems a matter of record that the Sacred Congregation of the Council does not favor the granting of secular parishes

to Religious *in perpetuum*. If such a status is desired by the Religious and the Bishop, then the right procedure is to change the parish into a "religious benefice" and then entrust it to the Community *in perpetuum*. This distinction seems to be too subtle for many persons, and some have not grasped its significance. A Bishop might feel that his powers over the parish have been limited or circumscribed, but this is not true or precise. Some Bishops have felt that this will forever tie their hands even in such matters as making a division of the parish at some future time. They might be reassured, however, if they recollected that canon 1426 clearly provides for such a case of division and it safeguards the Bishop's rights. The Code is very wise and sharp when it states that this new parish cut off a religious parish is a secular parish, not a religious parish. The Bishop's rights are well protected, and the new status granted the Religious is merely a better canonical standing before the law. It does not interfere in any way with the Ordinary's jurisdiction over the actual running of the parish. Actually it is not impossible that Religious Communities receive and accept such parishes even today, because some cases are on record, dating back to only a few year's time, when a secular parish was granted to Religious *in perpetuum*. The policy may be tightening, but it is still not unbending, as the facts show.

If, however, the Sacred Congregation of the Council is becoming stricter in this regard, perhaps it might be stated rather timidly that it seems as though the policy of the Sacred Congregation of Religious is not so rigid or unfavorable. It seems to find no difficulty in allowing communities to accept parochial work, and it is on safe ground (so it seems), judging from the centuries of tradition behind that policy.

The third agency at work in this matter is the Sacred Congregation of the Propaganda, and it has jurisdiction of course in mission countries. There seems to be a new policy at work, it might timidly be stated and conjectured, and the force of it

seems to be toward rigid limitation of religious parishes *in perpetuum* in their areas. Missionaries have reported that they are granted only *one* foundation *in perpetuum* in a given Vicariate or Prefecture, but they may be given or entrusted several others *ad nutum episcopi.* This policy may continue, but it is only fair to state that it is meeting with something less than enthusiastic approval from Religious Communities, because an institute may be very wary of pouring personnel and money into a parish or Vicariate where it has only a thin, nebulous, tenuous and temporary status, uncertain of the future and unable to make plans or provisions for future foundations, novitiates or scholasticates. There is no desire to profiteer on the need of an area; rather there seems nothing more than the desire for self protection and expansion.

The *Appendix* to this Part I contains a formula that is in use before the Sacred Congregation of the Council, and it is precise enough to become almost immediately evident and clear to the reader. It is a clear exposition of the contractual agreement between Bishop and the Institute, and when presented to the Sacred Congregation, the whole tenor of the relationship is obvious and patent. There is nothing mystifying about entrusting a parish to religious, and certainly nothing insidious or tangled. Even in the situations where there is need to "regularize" old arrangements, the Holy See has shown itself willing and ready to make all things right and proper. One Religious Institute held several such foundations without written documents attesting to their proper canonical beginnings, and it took immediate steps to straighten out the tangle of the past. It proceeded thus:

a) It prepared a full statement of the material, spiritual and canonical condition of each foundation in question.
b) It presented this statement to the Sacred Congregation of the Council and asked for an opinion on the proper canonical statement of each. The Congregation issued a rescript which made two explicit statements:

1—It safeguarded the validity of all Sacraments in all parishes. This was an important step taken at once, because there might have been reason to doubt in some cases, since there had been some national (i.e., not territorial) parishes involved in the original petition.

2—It proposed that all Ordinaries take necessary steps to regularize all the status of all parishes in their dioceses by making proper petition in due time.

This procedure might be long and involved, but it certainly is safe and sound canonically. Its only drawback is its lengthiness and delays and red tape. An even better way that is shorter would be the making of immediate recourse to the Bishop, asking that he take steps to regularize the old agreements and contracts. Here there is place for an "Episcopus benevolens" to ratify the old time status. If there are cases where the Bishop refused to grant the parish *in perpetuum*, even though the community has been working in the parish for innumerable years, there is little to do but to accept it *ad nutum episcopi*. There could be some grounds for legal appeal to Rome on this precise point, and there could be some briefs prepared on both sides of the controverted question. Ancient agreements that have been kept faithfully set up a *ius quaesitum*, it is logical to assert, and an Institute that feels itself harmed or damaged by a decision made in very late days has the right of recourse or appeal to the justice and the equity of proper Congregations in Rome. A Roman decision may throw the weight of law to the opposite viewpoint, but that is understandable and acceptable. The legal opinion being maintained here is that the final decision in such a controverted case will come from the august tribunals of Rome, and not from the august tribunals of the local Chancery Office. A decision from Rome will set up a policy; and when Rome speaks, the world listens.

[Part II of this Article will appear in the October number of the current year.]

APPENDIX

Present Form of Contract Used by S. C. Concilii for Religious Parish Entrusted *IN PERPETUUM PLENO IURE* with Apostolic Indult Annexed

CONTRACT

between the Ordinary of the Diocese of ..... and the Congregation of the ..... concerning the Parish of ..... at ..... State of .....

WE THE UNDERSIGNED

The Most Reverend ..... Bishop of ..... acting as such, with the consent of his Diocesan Council and in virtue of an Apostolic Indult dated ..... (no .....)
as the *Party of the First Part:* and

The Very Reverend ..... Provincial of the ..... Province of the ..... Congregation, acting as such, with the consent of his Council and of the Reverend Superior General, and with the authorization of the Sacred Congregation of Religious given by Rescript of ..... (No. 1111/99)
as *Party of the Second Part*

Declare by these presents that we have reached a common agreement in regard to the contractual clauses hereinafter stipulated, with the intention of mutually and respectively binding both ourselves and our successors in accordance with the obligation herein contained, *to wit:*

ARTICLE I

His Excellency the Bishop of ..... entrusts to the Congregation of ..... who in turn accept the parish of ..... at ..... in the State of ..... and unites the parish "*pleno iure*" in the meaning of canon 1425, par. 2 to the religious residence of the said Congregation of ....., canonically erected under the title of ..... at ..... in the State of ..... with all the canonical effects inherent in such a union.

ARTICLE II

The parish of ..... comprises the territory bounded by the territorial parishes of .....

ARTICLE III

The relations between the Ordinary and the Congregation of ..... in regard to the administration of the parish and the care of the parishioners are regulated by Canon Law and the clauses of the present contract.

ARTICLE IV

The appointment and removal of the Perpetual Vicar and of the Assistants will be effected in conformity with the prescriptions of Canon Law according to Canon 471, 478, par. 4 and 477, par. 1."

ARTICLE V

The juridical conditions of the properties which belong to the parish are governed by the prescriptions, regulations and discipline of the Diocese relating to such matters.

ARTICLE VI

The Congregation of ....., while assuming the administration of the goods of the parish, does not assume the financial responsibility in regard to them. For this reason the Perpetual Vicar shall not proceed to any act pertaining to extraordinary administration without previous authorization of the Ordinary given in writing.

ARTICLE VII

The priests of the Congregation of ..... assigned to the parish not only retain their Mass stipends, and receive the stole fees and customary offerings in accordance with Diocesan regulations, but also receive in remuneration a suitable salary.

ARTICLE VIII

In the event that the Congregation of ..... observing all due requirements should definitely relinquish the administration of the parish:

1—They could not demand anything from the parish or from the Ordinary *except:*

a) the goods of which they have and certainly retain the ownership. All the other offerings made by the faithful are presumed to have been given to the parish, unless there is some positive indication to the contrary, and are acquired by the parish.

b) the amount of money which might be due to them.

2—The local Ordinary and the parish, on the other hand, could not demand anything from the Congregation of ..... except the goods which really belong to the parish, or which are owed to either because of some title.

ARTICLE IX

The present contract will begin to bind and will produce all its effects the moment both contracting parties will have affixed their signatures.

ARTICLE X

The present contract cannot be modified or dissolved except by the mutual consent of the two contracting parties, saving the rights and privileges of the Holy See in this matter.

ARTICLE XI

The present contract will be signed in three authentic copies, one of which is for the Ordinary, another for the Provincial, and another for the General Administration of the Congregation .....

Done in triplicate.

In testimony of which we have affixed our signatures and our seals.

L.S. .....

Place Bishop of.....

Date

L.S. .....

Place Provincial of the ..... Province of the Congregation of .....

Date

INDULT ANNEXED

Sacra Congregatio Concilii

Beatissime Pater

Episcopus ..... ad pedes Sanctitatis Vestrae provolutus, humiliter exponit existare in loco ..... paroeciam a S..... nuncupatam, Congregationi ..... curis ab anno circiter ..... commissam, qui partes sacri ministerii cum solertia et uberioribus animarum fructibus ad hodiernam diem usque expleverunt ac explere pergunt.

Cum vero pro tali paroecia praedictis Religiosis committenda nullum reperiatur Sanctae Sedis indultum, orator, de Consultorum Dioecesanorum assensu, enixe a Sanctitate Vestra facultatem expostulat praefatam paroeciam Religiosis Congregationis ..... committendi iuxta conventionem quae separatim adiungitur, praevia sanatione quoad praeteritum.

SACRA CONGREGATIO CONCILII attentis expositis Episcopo oratori, praevia sanatione quoad praeteritum, facultatem iuxta preces benigne tribuit, ita tamen ut memorata paroecia concredita intelligatur dictis Religiosis ad nutum Sanctae Sedis et ad normam iuris.

Datum Romae ..... die ..... mensis ..... anno

Sigillum Congregationis Concilii

Signatura Praefectus

CHRISTIAN BURIAL PROBLEMS

ONE of the many great improvements in Church law that the Code gave us is the clarification of the notion of Christian burial, and the ample and clear-cut legislation in its regard. Before the Code, there had been no definition of Christian burial and, consequently, a great deal of confusion and misunderstanding. Yet, Christian burial dates from the earliest days of the Church, and the privation of Christian burial is an ancient penalty. But, as with so many other legal institutes, both of these suffered from the chaos in the field of Church law, with the result that many diverse practices and contradictory theories were developed. It was inevitable that some of these would carry over even after the promulgation of the Code, but it is also true that in almost no other field of Church law have so many Old Law theories and practices persisted, despite the very detailed and very new provisions of the Code.

We are not concerned here with the entire legislation on Christian burial, but we can review the salient points in which the Legislator has clarified the law and mitigated its severity in regard to the privation of Christian burial.

The Code defines Christian burial in c. 1204 which states that it consists of three elements: the transfer of the body to the church, the performance therein of the funeral liturgy, and the interment in a place set aside for the burial of the faithful. Now this definition makes a significant alteration of the pre-Code concept. Before 1918, Christian burial was quite generally considered to consist primarily in the right to burial in blessed ground, and, secondarily, in the liturgical functions that accompanied that right. Of these two elements, burial in blessed ground was the essential part, so that denial of Christian burial then meant, first of all, privation of burial in sacred ground, and, incidentally, privation of the

liturgical rites that went with it.[1] That the emphasis has shifted with the Code, however, seems quite certain, so that most authors now feel that the essential element of Christian burial is the funeral rites, and that the actual burial in blessed ground is of secondary importance.[2]

This change of emphasis is largely accounted for by the change, in modern times, in the ownership of cemeteries in many European countries, especially Catholic ones. Cemeteries there are now exclusively public property, owned and operated by the civil government. They are outside the jurisdiction of the Church, and all citizens are buried in them by law, whether they be Catholic or Protestant, Jew or pagan.[3] " It is a well known fact ", says the late Fr. Augustine, " that in Rome even cardinals must be buried in the common city cemetery." [4] Such a state of affairs naturally prevents the faithful from enjoying their ancient right of burial in a place reserved for them alone, and tends to make the principal element of Christian burial the religious rites, since over these only does the Church retain exclusive jurisdiction.

Moreover, there is a definite advantage in this shift of emphasis from the sacred place to the sacred rite. Where all three elements of Christian burial, as defined in c. 1204, cannot be had, e.g. burial at sea, the deceased may be said to have had Christian burial when the absolution prayers have been recited over him, even though he is not buried in a sacred place. Also, in circumstances due to war, where burial in blessed ground is unobtainable for many reasons, as in the case of a soldier killed in action whose body is lost or buried overseas, Christian burial may be considered to have been accorded him by the holding of funeral rites in the church at

[1] Wernz-Vidal, *Ius Canonicum*, VII, n. 451.

[2] Ayrinhac-Lydon, *Penal Legislation*, n. 269; Cerato, *Censurae Vigentes*, n. 42; Cappello, *De Censuris*, n. 401; Chelodi, *Ius Poenale*, n. 73; Coronata, *Institutiones Iuris Canonici*, II, n. 813.

[3] Power, *The Blessing of Cemeteries*, p. 97.

[4] *Op. cit.*, p. 95, n. 10.

home, with a catafalque representing the remains. This idea seems to be verified by a reply of the Congregation of Rites to a Brazilian archbishop, in 1920. It appears that the remains are not brought to the church there, because of a civil law that requires burial within twenty four hours after death. The reply stated that a funeral, with a funeral Mass, can be held even though the remains be present only in a moral sense.[5] In all these cases, the Church is granting as much of her traditional honors as circumstances beyond her control allow. By understanding Christian burial as either the carrying out of all three elements of c. 1204, or as many of them as are possible, one obviates much difficulty in determining when Christian burial is had, and when it is not had. It is had when the Church grants as much of the functions of c. 1204 as she can; it is not had when she refuses her rites and prayers, even though one might, through force or fraud, obtain burial in sacred ground.

A question suggests itself at this point that is very closely related to the general subject: what is " sacred ground "? On this question there is still a good bit of confusion in the minds of many. It is still not unusual to hear the remark that such and such a cemetery is not " sacred ground " for it has not been consecrated, but merely blessed. This distinction is quite unfounded in law. First of all, it is not absolutely required that the cemetery be " consecrated ". C. 1205 states that the bodies of the faithful should be buried in a cemetery which has been blessed according to the rites in the approved liturgical books, whether that blessing be solemn or simple. The solemn blessing of a place is called a " consecration " and is performed by a Bishop with the use of sacred oils. A simple blessing of a place—and we here refer to a cemetery, not just a single grave—is performed by the Bishop, or his delegate, using holy water. As far as the law is concerned, the result is the same. As c. 1154 puts it: sacred places are those which have been dedicated to divine worship, or the burial of the

[5] *Canon Law Digest*, I, p. 569.

faithful, either by the consecration or the blessing which the approved liturgical books prescribe. Therefore, whether the cemetery is solemnly blessed, i.e. consecrated, or simply blessed, it is a sacred place, sacred ground. No doubt, a consecrated cemetery is more holy than one that is simply blessed, but the canonical effect is the same in both. C. 1150 repeats this identity when it states that things consecrated, or blessed with the constitutive blessing are to be treated with reverence and not to be put to profane use. As Fr. Cornelius Power, of Seattle, points out in his dissertation on cemeteries: "In both consecration and blessing, the object passes from its original or profane state to a new state: that of being a sacred object." [6] And again: "Besides the solemn blessing, or consecration, of cemeteries, there is also the simple blessing of cemeteries. This latter is not merely an invocative blessing, (*benedictio invocativa*), but it is really a constitutive blessing (*benedictio constitutiva*), and by it profane ground becomes sacred".[7] And finally: "It is natural that the Church should wish that her sacred places receive a solemn, and not merely a simple dedication . . . But in as much as the simple, as well as the solemn, blessing constitutes cemeteries as sacred places, and affords them the same juridical effects, one finds today that more often than not, cemeteries are blessed with the simple rite rather than with the solemn ceremony." [8]

Another question, while we are on this subject: Is one who is buried in an unblessed cemetery thereby deprived of the third element of c. 1204: "burial in a place legitimately set aside for the burial of the faithful"? I believe that a close reading of the canon will indicate that he is not so deprived. The erection of an ecclesiastical cemetery is primarily an act of jurisdiction. It can be set up only by the decree of the competent ecclesiastical authority. Normally, this canonical erection will be confirmed by either consecration or blessing.

[6] *Op. cit.*, p. 65.

[7] *Op. cit.*, p. 90.

[8] *Op. cit.*, p. 95.

But if the blessing has to be postponed for various reasons, the people buried in that cemetery are still buried in a place "legitimately set up for the burial of the faithful." This does not minimize the mind of the Church that cemeteries be blessed, but it does emphasize the fact that Christian burial, as a legal entity, does not depend upon burial in blessed ground. This opinion is supported by such authorities as Cappello,[9] Cavigioli [10] and Cerato [11] who agree that it is not necessary that the bishop actually decree the designation of the cemetery; it is sufficiently implied if a particular place, unblessed as a whole, has been used for the burial of the faithful over a period of time, for in such a case there is at least tacit approval of the superior.

Another author, Petroncelli, writes in a similar vein: "The essential note of this designation (*deputatio*) is the act of ecclesiastical jurisdiction. Such an act is implied in the blessing by the bishop or his delegate, but, fundamentally, it is independent of the ritual, and is a juridical act which may either exist alone, or be understood as implied in the liturgical act. An example of this is found in c. 1212, which sets aside an unblessed part of a Catholic cemetery for the burial of those who may not be buried in blessed ground. The requirements for such an act of designation are simply the competence of the Ordinary and a just cause." [12]

We have good grounds for holding, therefore, that those people who, by force of circumstances, are buried in an unblessed Catholic cemetery, are not deprived of the third part of their rights as accorded in c. 1204, i.e., burial in a place legitimately set aside for the burial of the faithful. And, in fact, the alternative is repugnant. It would mean that there is no complete Christian burial except in those places where there are blessed cemeteries. This conclusion would deprive

[9] *De Censuris*, n. 401.

[10] *De Censuris Latae Sententiae*, n. 150.

[11] *Censurae Vigentes*, n. 42.

[12] *Apollinaris*, XI (1938), 593.

populations of entire nations from the benefit of this favor of the Church, nations in which it is impossible to have blessed cemeteries because of civil law difficulties. Since the Church, in such countries, permits, or tolerates, the use of public cemeteries, it would seem that, at least by tacit consent, these places are legitimately dedicated, that is, in so far as they can be.

One last word on this subject. With regard to the blessing of the individual grave, the blessing is invocative only, not constitutive. There is no constitutive blessing provided for a single grave. The invocative blessing invokes God's protection; it does not make the grave sacred ground in the canonical sense.[13] This blessing is used only when the cemetery, as a whole, has not been blessed.

Now, as to the obligation of the faithful to have Christian burial. Strange to say, there is no canon that specifically commands Christian burial. One suggested explanation for this omission is that there is no specific person upon whom the law could lay the obligation. It cannot command the dead; and it is impossible to impose upon any one particular person, to the exclusion of others, the care of, and the responsibility for the obsequies of another.

However, the obligation exists clearly from custom. Both pre-Code and post-Code authors agree in this. Reiffenstuel, in a reply to a question as to who may, and who must be given Christian burial, answered that only the baptized faithful *may and must* be given it.[14] And Wernz, noting that one is not free to refuse Christian burial, declared that private choice in this matter may not change the public law, which absolutely prescribes Christian burial for the faithful unless they have rendered themselves unworthy of it.[15] He further notes that any provision inserted in one's last will and testament that forbids Christian burial, is to be considered as not

[13] Power, *The Blessing of Cemeteries*, p. 107.

[14] *Ius Canonicum Universum*, lib. III, tit. 28, n. 76.

[15] *Ius Decretalium*, Tome III, pars II, p. 497, note 35.

having been made. Moreover, the relatives have no right to prevent or impede Christian burial for one of the faithful, even though he be unworthy of it in their estimation.[16]

Post-Code authors are equally emphatic. Cappello asserts that Christian burial belongs to the public order, and therefore no one may renounce it, or be denied it by other than the ecclesiastical authorities.[17] All this is confirmed by a reply of the S.C. of the Council, in 1924, which states that all the baptized are to be given Christian burial unless they are by law deprived of it, and that means that one entitled under the law to religious burial may not exclude it at will, although he may forego the pomp and ceremonies that do not belong to the essence of the rites.[18]

It is not idle for us to settle this point, for our modern funeral parlors and elaborate cemeteries sometimes compete for the funeral even of Catholics. Their widely advertized services often include the funeral itself, with its nonsectarian, and even nonreligious character. Such advertisements do influence some weak Catholics. The authors are unanimous in stating that the harm to religion from such a lay funeral, and *a fortiori* a Protestant one, can very often be much greater than that which would be caused by the granting of Christian burial to one not fully worthy of it.[19]

With regard to the privation of Christian burial, that is, the refusal to grant all three parts of c. 1204, it is quite generally agreed that this is an ecclesiastical penalty.[20] Since this is so, Christian burial cannot be denied by ecclesiastical law unless a canonical delict has been committed. This fact needs to be stressed, for we sometimes forget the canonical

[16] *Op. cit., loc. cit.*

[17] *Summa Iuris Canonici*, II, n. 705.

[18] *AAS*, XVI (1924), 188.

[19] Wernz-Vidal, *op. cit.*, IV, n. 587; Vermeersch-Creusen, *Epitome*, II, n. 549; Coronata, *Institutiones Iuris Can.*, II, n. 817; Brys, *Collationes Brugenses*, XXV, 161.

[20] Kerin, *The Privation of Christian Burial*, p. 131.

nature of the privation, and the consequent obligation that the pastor of souls has to proceed in a canonical manner. Sentiment, piety or personal prejudice must not blind us to this fact. To refuse Christian burial is to pronounce a declaratory sentence, formally announcing that a canonical crime has been committed, and the canonical penalty incurred.

The privation of Christian burial is also an automatic penalty; that is, it is incurred by the delinquent as soon as the crime has been committed.[21] Whether the penalty is ever executed or not does not alter this fact. Bernardini states that it is just as possible to incur a penalty while living, that will be executed after death, as it is to obtain a right while living that can be obtained only after death, e.g. the right to burial in a family plot, or an inheritance.[22]

Sometimes we hear it said that this penalty seems to be rather a useless one, since, obviously, there is no hope of reforming the dead delinquent. It is at such times that we need to remind ourselves that the privation of Christian burial is a vindicative penalty, and, therefore, it is not intended primarily for the reform of the delinquent, but rather aims at the repair of the social order, and serves as a warning to others that they may be deterred from similar crimes.

This punishment is one of the most severe of all ecclesiastical penalties. It is intended for the very worst offenders only, offenders, not against the laws of God, but against ecclesiastical public order. It deprives the delinquent of the funeral rites of the Church, and of a resting place among the faithful departed. It is an extreme penalty, to be dreaded by the faithful, and to be used by the Church only as a last resort. To appreciate it fully, we must leave our own society in America, with its elaborate, publicly honorable, and not infrequently used, substitutes for Christian burial. We must imagine ourselves in a community such as the Legislator must have had in mind, one overwhelmingly Catholic, where the

21 Kerin, *op. cit.*, p. 132, note 27.

22 *Il Diritto Ecclesiastico*, XL (1929), 473, 479.

sects are almost unknown. In such a locality, the penalty would mean that the delinquent could not be brought to the churches used by the community, or be buried where most of the community was buried. To be buried from one of the so-called chapels of the insignificant sects would be unthinkable to people living in such a Catholic community. The result, then, is a non-religious burial in a field or garden or some other out of the way spot. The net result is a thoroughly public disgrace of the delinquent, deliberately intended by the Legislator for notorious violators of the ecclesiastical public order, and as a stern warning to others. The severity of this penalty is most evident from the obvious reluctance of the Legislator to inflict it. This reluctance is clearly evident not only in the limited list of culprits who incur it, according to c. 1240, but also from the several mitigating clauses contained in the same canon.

Considering the list of those who are denied Christian burial by c. 1240, we note first that it is refused to apostates, but not to all apostates, only to notorious apostates; also it is refused to heretics, but not to all heretics, only to notorious members of the heretical sects. The same is true of schismatics. Again, it is refused to Masons, but only if they are notoriously affiliated with Masonic sects. Theoretically, then, a Catholic who was a secret Mason would not incur the penalty. This element of "notoriety" demands an explanation, for it runs throughout the first paragraph of c. 1240, and is often confused with the word "publicity".

Notoriety may be legal or factual. We shall concern ourselves only with factual notoriety, since legal notoriety, while not absolutely unconcerned with our question, is, however, so remote a contingency that we need not bother with it. A crime is factually notorious when it is publicly known, and was committed in such circumstances that it cannot be concealed by any subterfuge or excused by any legal principle.[23] Benedict XIV declared that notoriety produces the same

[23] Ayrinhac, *Penal Legislation*, n. 6.

moral certitude about a delinquent's guilt that is possessed by a judge when he pronounces sentence from the evidence produced in a trial.[24] And Coronata states even more strongly that notoriety permits a judge to pass sentence immediately, without the need of a trial to establish guilt.[25] Notoriety, then, is that element of a crime which makes most evident the intention of the delinquent to commit the crime as an act that he knew was contrary to the law. And Vermeersch-Creusen declare that a crime is not notorious if there is any doubt extant as to its imputability.[26] Coronata adds that notoriety produces certain and public knowledge of a crime,[27] while Chelodi is perhaps the plainest of all when he asserts that by notoriety, the crime, both as to the illegal act itself, and as to the intention to violate the law, is so clearly established before the people that there cannot be even the slightest doubt about either.[28] Furthermore, notorious crimes cannot be distinguished between material and formal ones, for they are so obviously culpable that they cannot help being formal.[29] He who commits a notorious crime, therefore, is one who is popularly believed to have known that he was breaking the law, and to have chosen freely to do so.[30] It is precisely this element of inexcusability that differentiates a notorious crime from a merely public one.[31] In this matter, then, there are no occult cases. One is either publicly worthy of Christian burial, or he is publicly unworthy.

We have already seen that notorious apostates and notorious members of heretical or schismatical or Masonic sects are denied Christian burial. We shall now see that this

[24] *De Synodo Dioecesana*, lib. VII, c. XI, n. VIII.

[25] *De Locis et Temporibus Sacris*, n. 258.

[26] *Epitome*, III, n. 384.

[27] *Op. cit.*, n. 258.

[28] *Ius Poenale*, n. 4.

[29] Coronata, *Institutiones*, IV, n. 1646.

[30] Roberti, *De Delictis et Poenis*, 44.

[31] Augustine, *A Commentary*, VIII, 17.

element of notoriety runs throughout the classes of culprits mentioned in c. 1240, n. 1. This is a conclusion that is based on number six of the first paragraph of the canon, which reads: "other public and manifest sinners". "Public and manifest sinners" are, in fact, notorious sinners, for the word "manifest" adds to the word "public" that element of inexcusability that makes such a sinner notorious.[32] And the use of the word "other" implies that all the foregoing delinquents, namely, suicides, duelists, excommunicates, etc., have been included only in so far as they, too, are public and manifest, and therefore, notorious sinners.[33] This requirement, that all delinquents enumerated in paragraph one of the canon be notorious before they can be considered to have incurred the penalty, is also implicitly contained in the second paragraph of the same canon. Here the Legislator orders that Christian burial is not to be denied if there is any persistent doubt as to the person's inclusion among the classes mentioned in the first paragraph. It is only notoriety that leaves no doubt, for if there is any doubt about either the fact of the crime, or the guilt of the delinquent, the crime is not notorious. The legal meaning of this word is, indeed, far and away beyond the ordinary significance of the term.

I should like to interject a comforting remark at this stage. It should not be forgotten that an error in this matter of denying Christian burial has none of the consequences that would arise from a refusal to grant the sacraments. This law is purely of the external forum, and the external state of the soul is in no way determined by it. Where the reception of the sacraments may mean the difference between salvation and damnation, Christian burial cannot decide the eternal status of a soul which is already before God, and beyond the power of the Church either to save or to condemn.

To continue, now, with the enumeration of the classes to be denied Christian burial, we come to the excommunicated

[32] Blat, *Commentarium Textus*, lib. III, pars II, n. 104.

[33] Brys, *op. cit.*, XXV, 162, 163, 245; Coronata, *De Locis Sacris*, 262.

and the interdicted. The latter give us little trouble these days, since the penalty is almost obsolete. It is worth while noting that the ordinary excommunicates, that is, those who have had no sentence passed on them, are not deprived of Christian burial simply because of their excommunication. The canon explicitly refers only to those who have been excommunicated by sentence, whether declaratory or condemnatory. Excommunication, as such, is, therefore not a reason for denying anyone Christian burial. However, if the excommunicate is also a public sinner, he will then come under that category which is mentioned later in the canon.

Another category, duelists, offers little difficulty since there are few duelists in these times. The only interesting thing about them is that their crime was regarded as so serious before the Code that they were refused Christian burial even after reception of the Last Sacraments.

The canon forbids Christian burial to suicides, and adds the qualifying words: "*deliberato consilio*", which clearly rule out all those who were not in full possession of the use of their faculties when they committed self-murder. This crime is, unfortunately, on the increase in our time, and always poses a problem for the priest. It is here, precisely, that an awareness of the meaning of the word "notorious" is most necessary, as well as most helpful. For the act of suicide must be a notorious crime, as explained earlier, to come under the law of privation as provided in canon 1240. The consequence of this requirement is that, no matter how culpable it may have been, if it is not publicly known that the act was fully deliberate, that is, done in full possession of one's faculties, he may not be denied Christian burial. We must continually remind ourselves that, in this matter, it is not the state of the deceased's soul that is the determining factor, but his external status before the public, the parish or the community. Therefore one is either publicly worthy or publicly unworthy. The result of this fact is that if the act of suicide is, in fact culpable, but that culpability is known to only a few discreet people

who can be depended upon to keep the secret, he cannot be refused Christian burial. It may seem strange that we, as priests, may have to officiate at the funeral rites of one who, we know, is completely unworthy, but who is publicly esteemed as worthy. This only emphasizes what I have been trying to make clear: Christian burial is denied only for specific offenses against the public order, and not for sin alone. In this matter, the priest is the judge, not the accuser, and it is not for him to publish anyone's unworthiness, when it is otherwise unknown.

In this matter, also, it is not for us to contest the published decision of a doctor or coroner. If they err, that is not our fault, and we should abide by their official decision of accidental death, or temporary insanity, even if we feel, even if we know, that their decision is contrary to the facts.[34] Their decision is a public absolution of the deceased, and it would be most out of place for us to contradict their announcement. In fact, it might amount to the giving of the impression that we were violating the seal. All this is not to say that insanity or accidental death is not to be established. That is to be done, but once done, they are clear grounds for not refusing Christian burial. Ordinarily, there is not too great a difficulty in granting Christian burial to a suicide, since most people these days consider the fact of suicide, itself, a sign of at least temporary insanity.[35] Nor is there any need for us to go into the numerous types of mental derangement. The canon requires that the act be notorious. Consequently, any doubt about either the full advertence to the act, or about the guilt, would destroy notoriety.

With regard to those who have ordered their own cremation, it is interesting to note that it is not the fact of one's being cremated that is punished, but the very expression of the desire, whether cremation actually happens or not.[36] Again,

[34] *L'Ami du Clergé*, XXXVIII (1921), 554.

[35] Vermeersch-Creusen, *Epitome*, III, 552.

[36] *P.C.I.C.*, 10 Nov., 1925, *AAS*, XVII (1925), 583.

the desire must be notorious, which means that if the desire can be concealed, Christian burial is not to be denied. If one is cremated through no desire of his own, there is, of course, no fault on his part and no incurring of the penalty. A Catholic who receives the Last Rites, or a convert who dies without adverting to a previous request for cremation, may easily be presumed to have implicitly revoked the expressed desire.[37] However, if cremation actually takes place, Christian burial may have to be denied in a given locality because of the danger of scandal that is present there. When the danger has passed, the cremated remains could be buried in the cemetery quietly, provided that there is no particular legislation against it.[38]

When we come to the denial of Christian burial to public and manifest sinners, we run into difficulty, for the Code does not define the term. We have already seen that " public and manifest sinners " are the same as " notorious sinners ". The difficulty is that the canon denies Christian burial to *delinquents*, not to sinners, as such, and delinquents are those who have committed a canonical crime. All crimes are sins, but not all sins are crimes. However, the difficulty is largely speculative, and we need not go into the matter at length, for even though one were not guilty of a notorious crime in the canonical sense, the notoriety of his sin might deprive him of Christian burial, because of the need to observe the divine law of preventing scandal were it granted to one so publicly considered unworthy of it.

With regard to specific public sinners, it is interesting to note that the Code has omitted a frequent source of denial that was contained in the Old Law, namely, the neglect of Easter Duty. The obvious conclusion from this omission is that the Legislator no longer considers this a crime that merits the denial of Christian burial. True, Easter Duty is still commanded, in c. 859, but the failure to make it no longer carries

[37] Connolly, *The Jurist*, XI (1951), p. 359.

[38] *Loc. cit.*

with it a canonical sanction. Therefore, the mere neglect of Easter Duty does not incur the privation. In today's practice, it will rarely be justified to refuse Christian burial to a Catholic merely because he failed to make his Easter Duty within a year, or two or five years before his death.[39] Simple neglect of this duty is no longer a canonical crime. If, however, failure to carry out this prescribed duty implies, not just carelessness, but contempt for, or abandonment of the Faith, and if this is a notorious fact, the divine law of preventing scandal would operate to preclude the granting of Christian burial to one so obviously unworthy of it.

Gangsters, in the modern concept of the term, quite easily fit into the category of notorious sinners, for their sins are usually also crimes, i.e. murder, theft and the like. If, by some remote possibility, one of them might be just a notorious sinner and not a notorious delinquent in the canonical sense, the probability of grave scandal in granting Christian burial to such a one would annul his theoretical right to it.

This section of the canon that deals with public and manifest sinners, is a catch-all for many who may have technically escaped inclusion in the foregoing categories. Thus, notorious heretics and schismatics, who have left the Church but not joined a sect, will easily come under its provision. Others who will qualify for this category are those who are guilty of notorious adultery, prostitution or concubinage; writers of obscene books; those who have notoriously flaunted the Church's laws. Ayrinhac-Lydon point out that the loss of one's good name and the incurring of public contempt necessarily imply the existence of some notorious crime.[40] Still others who may be included here are such chalatans as prey upon the public's credulity, as magicians, sooth-sayers, fortune-tellers, spirit mediums and the like. Again, notoriety must be verified; they must be publicly considered as culpable of the wrong they do.

[39] Schaaf, *AER*, vol. 95, p. 192.

[40] *Penal Legislation*, n. 161.

One of the most difficult problems that we encounter comes under this category: the question of what to do with those who die while involved in an invalid marriage. If there is no notoriety, that is, the invalidity of the marriage is not known, or is known to only a few discreet persons, Christian burial cannot be denied. Or if the deceased had been involved in an invalid marriage, but had freed himself from it before death, Christian burial should not be denied. But where the case is notorious, there is sometimes an inclination to err on the side of clemency and to accept any sign of repentance as sufficient to justify Christian burial. What complicates these cases is the fact that the deceased may have been faithful to Sunday Mass, a loyal supporter of parish activities, raised his children Catholic, etc. What we must look for, and find, is a sign of repentance for the concubinage itself. There is no sign of repentance that is sufficient to remove the notoriety unless it refers to that crime. Such a sign is lacking in the case of one who perseveres publicly in an illicit union, no matter how many Masses he may have attended, or how generous he is to the parish. The general rule, then, is that if a separation was not effected before death, or if, *in extremis*, a promise of separation was refused, Christian burial must be denied. That is the general rule, but, like all rules, it must admit of exceptions at times. Where a total refusal of Christian burial might result in the rearing outside the Church of the children of such a union by a resentful spouse, limited or partial Christian burial might be given privately, if it can be done without scandal.[41] Likewise, when a couple have begun the attempt to straighten out their marital problem, i.e., the case is before the diocesan tribunal with good prospects of success, but is still not completed at the time of the death of one of them, a curtailed rite might be permitted, omitting, for example, the funeral Mass.[42] More

[41] Connolly, *The Jurist*, XI (1951), p. 373.

[42] *Loc. cit.*

will be said on this subject of limited or curtailed rites when the question of the removal of scandal is discussed.

Special difficulty also arises when the delinquent was a high civil official, e.g. a governor, senator, judge, any one in a post of national significance. Here a conflict may arise between the external and official regret that the Church must express at the nation's loss, and the liturgical recommendation of his soul to God. Such cases are more frequent in countries in which there is a large anti-clerical element, but they could happen in our country, too. In such cases, refusal of Christian burial may be publicly considered as an act of hostility to the government, or to the party in power, or as a blind and arbitrary application of the law. It becomes more complicated still, when such a prominent public figure is assassinated while in office, and has become clothed in a martyr's mantle in the eyes of the public. In these cases, the Church is in a dilemma, for scandal may be caused whether she grants it or refuses it. Obviously, the less scandalous course must be followed in each case.

There is also the case of the service man who dies on the field of battle, and whose body is shipped home for the honors of a hero's funeral and burial. He has never fixed up his invalid marriage or publicly expressed regret for it. Here, again, the pastor must be careful, and follow the course that will give the less scandal. If a refusal of Christian burial will bring contempt upon the Church and harm to religion, as it may easily do, it should not be refused. Such a man is popularly considered to have undone whatever wrongs he may have committed, by his sacrifice of his life for his country. If so, the notoriety of his crime obviously has ceased. Some consideration must be given, at least, to the fact that he was not actually living with his illicit spouse when he died. The soldier who dies for his country performs an act of supreme charity, even though he may not be fully conscious of this. Cardinal Mercier says somewhere that such a sacrifice cancels a lifetime of sin; it transforms a sinful man into a saint.

While this may not be theologically or legally correct, it does have an element of truth in it. If such a man is locally considered a hero, he can hardly be also considered as a notorious sinner, even though he may have been formerly.

Somewhat earlier, we noted that the severity of the penalty of the privation of Christian burial is proved by the obvious reluctance of the Legislator to inflict it; a reluctance that is most evident both from the limited number of offenders listed as deserving it, and from the mitigating clauses that govern its application. Now a few words about those clauses.

In the opening words of canon 1240, it states that the penalty is to be imposed unless some signs of repentance have been given before death. These words could not be more general, and they restore to the deceased his right to Christian burial, even if he had lost it by the committing of the most notorious crime. The extending of this mercy to all the classes of delinquents included in the canon is new law, for in the old, some people were still refused Christian burial even if they had repented, e.g. duelists.

It is impossible to think of all the possible signs of repentance, but we can consider a few of the more common ones. First, however, we should recall that the sign must be external, and therefore provable. It is not to be presumed, that is, there is no value in the presumption that the deceased may have repented internally before he died. This is certain from a reply of the Holy Office: ". . . for since nothing can be known regarding this supposed retraction, it is obvious that no consideration can be given to it in the external forum." [43] It is evident, then, that the sign must be a positive one, and one that can be related to the crime for the commission of which Christian burial had been denied. Such a sign may be explicit or implicit; that is, a formal retraction is not necessary so long as there is some sign, no matter how small, that the perverse will have been retracted.

[43] 19 June, 1926, *AAS.*, XVII (1926), 282.

Nor is the conditional conferral of the sacraments, *per se*, a sufficient sign of repentance. Conditional administration of the sacraments upon an unconscious person is valueless as evidence of a change of heart by that person. It is intended only for the internal forum. The law of Christian burial does not pass upon the state of the soul, but rather upon a person's public status before the Church. Notoriety is not removed without there being an external sign of repentance.[44]

On the other hand, the reception of the last sacraments by a conscious person—if made public, as it should be—easily forms the basis for a presumption that the deceased had repented of all his faults. And this would still be true even if he forgot to confess the crime for which he had forfeited Christian burial. Public assumption of repentance could also be had in another way, for example, in a case in which there actually was a refusal to repent. A delinquent, on his death bed, might consent to receive the priest who had been sent for, hopefully, by the family, and they might remain alone for some time. The assumption that the delinquent was making his peace with God during this time could easily gain ground, for example, by the relatives announcing his presumed repentance to one and all, not only in the house, but in the neighborhood, and even by telephone. In reality the delinquent may have refused all retraction and have actually spurned the priest, dying in hostility to the Church, before the priest left the room. If the priest, upon emerging from the room, found such a presumption already current and being broadcast, it would not be his office to deny it by publicizing the dead man's impenitence. The case, admittedly, is not a likely one, but it does illustrate the possibilities contained in the benign law on the denial of Christian burial.

Other signs of repentance that come to mind are: the kissing of a crucifix or any other religious article, especially by one who cannot speak; the sending for the priest by the dying

[44] Connolly, *op. cit.*, p. 370.

delinquent, even if the priest arrives only after death;[45] the expressed desire for the sacraments, or any similar act that implicitly, at least, displays a regret for what one has done against the laws of the Church.[46] Other similar signs could be: the promise to regularize one's irregular situation as soon as possible; an expressed desire not to die without the sacraments; any expression of regret for having acted in such a way as to have been deprived of them.[47] However, such expressions may be rendered inefficacious because of the lapse of time between their utterance and the time of death, time within which these sentiments might easily have been acted upon, but actually were not. In the latter event, they could be accepted only in cases of sudden death, or where there is persistent doubt, and then preferably with the consent of the Ordinary.

If the sign of repentance was not public, that is, witnessed, it must at least be capable of being made public.

Another mitigating clause occurs in paragraph two of the canon: "whenever there is a doubt as to whether one has incurred the penalty, the Ordinary is to be consulted, if there is time; if the doubt persists, Christian burial is to be granted, in such a way, however, as to remove scandal." The power of priests in determining this penalty is, therefore, limited to those cases where privation has indubitably been incurred. The judging of doubtful cases is reserved to the Ordinary, unless time does not permit recourse to him. This command, namely, that Christian burial is to be granted in all cases of persistent doubt, is new in the Code, but it only crystalizes the practice that was already becoming prevalent before 1918. It restores to the deceased a legal title to Christian burial on the basis of the doubt itself. By ecclesiastical law, therefore, all have a right to Christian burial unless they have indubitably incurred its privation.[48]

[45] Coronata, *Institutiones Iuris Canonici*, II, n. 816.

[46] Ayrinhac, *Administrative Legislation*, n. 78.

[47] *L'Ami du Clergé*, XXXVIII, 684.

[48] *Op. cit.*, 630-631.

Recourse to the Ordinary, as it is prescribed in this canon, is the same as that mentioned in other parts of the Code, i.e. by visit or by mail. Since such recourse will often be impossible, because of the lack of time, practically speaking, the decision will fall to the pastor. It would be an unusual man, however, who would prefer not to consult the experience of the Chancery by telephone in these difficult cases.

Doubt may arise from many sources. It may be about the efficacy of the sign of repentance; about the publicity of the membership in a condemned society; about the manner of the death itself, v.g., whether it was accidental or intentional; about the amount of danger of scandal involved; about the danger and harm to religion, and others.

This granting of the benefit of the doubt is entirely in accordance with the milder discipline of the Church in this matter in the New Law. The Church, far from insisting upon a rigorous application of this law, today practices the greatest forbearance, and is ready to grant the benefit of the doubt; in fact, commands that it be granted, to the deceased.[49]

The element of scandal plays a large part in the solving of Christian burial problems. The scandal referred to is, of course, theological scandal: the leading of others into sin. The avoidance of the danger of scandal is an obligation of Divine Law itself. Scandal must therefore be avoided, as far as possible, not only in doubtful cases, but in all cases. Christian burial must be denied whenever it is prudently judged that its granting will ineviably result in serious scandal. And this remains true even in the case where the penalty may not have been incurred, according to the ecclesiastical law, and the deceased is actually canonically worthy. Thus it might happen that grave scandal is bound to arise because a cremation is going to take place, or has already taken place, even though the deceased is innocent of having requested it. Or the family may be so bold as to surround the funeral with things that are incompatible with the respect due the Faith,

[49] Schaaf, *AER*, XCV (1936), 191.

such as Masonic services or emblems. In such cases, the consideration of the public order, the necessity to obey the Divine Law, override any right that the deceased had by ecclesiastical law.[50]

Of course, it may happen that scandal will arise anyway, no matter what course is followed. In such circumstances, all that can be done is to choose the course of action that will give the less scandal.

As to ascertaining the danger of scandal that may be expected in a given case, let the parish priest consult the opinions of some of his better and more discreet parisoners. Undoubtedly, such a procedure must be carefully done, but a good pastor knows his people, and can usually gauge the public feeling by taking counsel with a few well-informed members of his parish, whom he can trust to respect secrecy.

In view, therefore, of these almost nullifying provisions, contained in the law itself, it must be concluded that the Legislator intended this severe penalty only for those who are notoriously guilty and notoriously unrepentant, hopeless delinquents, unworthy of any mercy. The requirement that the delicts, for the perpetration of which the penalty is incurred, must be notorious, will render the privation of Christian burial, as a *penalty*, rare.

The necessity of preventing scandal, an obligation of Divine Law, will be the more frequent cause of the privation, and not infrequently of the non-privation of Christian burial. "*L'Ami du Clergé*" provides a practical rule in the following words: Christian burial will be granted when its denial will result in grave scandal to the faithful, whether that scandal arises from a Protestant or lay funeral, or from the fact that the deceased was popularly considered as worthy of it, regardless of the pastor's private opinion. Obviously, the deceased was not a notorious delinquent. Christian burial will be refused when its concession will give serious scandal

[50] *L'Ami du Clergé*, XL (1923), 311; Instruction of the Holy Office on Cremation, June 19, 1926, *AAS*, XVIII, 282.

because of the fact that public opinion holds the deceased unworthy of it, even though the pastor believes him worthy.[51]

When privation of Christian burial has been incurred, it should be the pastor who informs the family of the decision, not the undertaker or anyone else. It is, admittedly, a painful duty, but it can be handled tactfully. If there is unpleasantness on the occasion of the reception of the news, a good idea is to interrupt the turmoil with an appeal to all present to kneel down and recite, with the priest, the rosary for the soul of the deceased. This usually will have a calming influence and it is something that they can hardly refuse to do. After that, the matter can usually be discussed more reasonably. The pastor should remind the family that the refusal of Christian burial is not a sign of damnation, any more than the granting of it is a pledge of salvation. A private visit by a priest to the home or funeral parlor, and the recitation of a few informal prayers will help to take the edge off the blow. However, no book of any kind should be used in these prayers, lest they take on the appearance of a substitute rite. To refuse to visit the home, or the family in its grief, amounts to putting the house under interdict, and is an entirely unjustified humiliation of the family. The privation of Christian burial deprives the deceased of funeral rites and burial in ground reserved for the faithful, not from private prayers and private Masses. There is a growing opinion that one who has been denied Christian burial may be permitted burial in a family plot in a Catholic cemetery, with no rites, if it is necessary to avoid a greater evil.[52]

There is also a growing feeling that mitigating circumstances of a sufficiently serious nature, would allow the Ordinary to dispense from the law that refuses all religious rites, to the extent of granting some of them to prevent a greater evil. The greater evil might be: the harm to religion that would result from a Protestant or lay funeral, the danger of the

[51] XL (1923), 311.

[52] Connolly, *op. cit.*, p. 373.

loss to the Church of the surviving family, etc. The authors all agree in deploring the evils of such funerals, and the scandal that they cause.[53] That they do cause scandal in our country is true in the strictest sense. They are so readily available, so publicly respectable in our society of mixed religions, that the penalty of the privation of Christian burial has almost completely ceased to be a deterrent to the faithful, a fact that is overwhelmingly proved by the great number of Catholics who marry outside the Church in this country. Obviously, they have not been deterred from their sinful course by the fear of losing Christian burial.

It would appear, therefore, that the ends intended by the Legislator, that is, the total disgrace of the delinquent, and the frightening of others from the commission of a similar crime as his, cannot always be obtained in our country, because of the easy availability of Protestant or secular funerals. Our Catholics are well aware that, not only is there no public stigma attached to such funerals, in the eyes of the general community, but, on the contrary, they are considered as equally respectable as Catholic rites. In a Catholic country or society, there would be no such alternative, and the deceased would be shamefully buried in some obscure spot without any rites whatsoever. The full execution of this penalty is, therefore, usually useless in America, in that the ends desired are frequently unobtainable.

The full execution of the penalty is not only often useless, but it is also sometimes even harmful, both to the bereaved family and to the faithful in general. It throws the Catholic relatives into the willing and waiting arms of the Protestant clergy, or the undertakers, with their non-sectarian service. And, at such times, the Church may be made to appear excessively harsh in her attitude, in view of the sympathy and aid that these non-Catholics are prepared to extend. The employing of these non-Catholic alternatives to Christian burial may easily alienate a Catholic family from the Church,

[53] Kerin, *op. cit.*, p. 156.

for they can hardly be expected to act prudently in their grief and bitterness. It may also cause a resentful surviving spouse to rear the children outside the Church. The rest of the faithful may be made careless, aware as they are that they need not fear excessively the denial of Christian burial, since even so-called good Catholics do have recourse, in their desperation, to Protestant or secular funerals, and, as far as the community is concerned, they are thought none the less of. Therefor, the full execution of the penalty may even lead to scandal: the causing of others to sin.

These circumstances in our country, namely, the fact that the society in which we live regards all religions as equal, and all funerals as equally honorable; and the fact that Protestant and lay funerals are readily available substitutes for Christian burial, as well as the fact that Catholics, all too often, have recourse to these substitutes, these circumstances may render the full execution of the penalty not only useless but even harmful.

The practical alternative, then, to full privation, is the obtaining from the Ordinary of permission for partial privation, a dispensation that he would seem to be able to give according to canon 81. By limiting the funeral to the minimum rites prescribed by the Ritual, by omitting the tolling of the bells, having the funeral at an unusual hour, prohibiting any music or singing, and the omission of the names of the church and cemetery from the funeral notices, under penalty of full privation, by these means there can usually be expressed the evident disapproval of the Church for the life of the deceased, sufficient to disgrace him and, at the same time, to deter others from imitating his example.

Some authors suggest that the Mass may be omitted from this curtailed rite,[54] for, indeed, the essential element of the funeral rite is the absolution.[55] However, most writers feel

[54] Brys, *Iuris Canonici Compendium* (1949), vol. II, p. 98: ". . . non concedendo nisi absolutionem in Ecclesia . . . "; Donnelly, *AER* (1940), vol. 103, pp. 12, 13; Connolly, *op. cit.*, p. 361.

[55] *Collationes Brugenses*, XXVI (1926), p. 320.

that the Mass should not be omitted, but rather that it be celebrated "*sine pompis et solemnitatibus*". The omission of solemnity clearly implies that the Mass be Low, not sung or solemn, and this was specifically prescribed by the Sacred Penitentiary in a reply to a question submitted from France. It was asked what sort of funeral should be given to those legislators who had voted for the anti-clerical laws, and who had died "not certainly repentant". The answer stated that they should be buried with a "Low Mass and simple absolution".[56]

A question may arise as to whether or not this suggested Low Mass violates a more recent decree of the Congregation of Rites, which prescribes a High Mass for all funerals, except in the case of the poor.[57] We must remember that this decree is speaking of the usual funeral, not the exceptional case. It reprobates the growing *custom* of Low Masses, even with some pomp, at funerals. It would forbid the people's choosing a Low Mass instead of a High Mass, and also would forbid the clergy from having Low Mass funerals as a rule. It is clearly concerned with the too frequent substitution of a Low Mass for a High Mass. It is not concerned with the exceptional case, such as we are discussing, where there is doubt about the worthiness of the deceased, and where, as has been noted, authors generally forbid all pomp and solemnity, which evidently would not be the case if there were music and singing.

Undoubtedly, there will occur cases in which even this curtailed funeral rite will not be available, and there will be no alternative to the full application of the penalty. In most cases, however, the substitution of the curtailed rite for the total privation of Christian burial will mean the difference between keeping a family in the Church and driving it out. Usually, all that the family desires is that their deceased relative be not buried, as the saying is, "like a dog". They may

[56] *IER*, XXV, 4th series, 1908, p. 666.

[57] May 1, 1942, *AAS*, 34-205.

be good parishoners, themselves, and fully aware of the unworthiness of that member of the family to have the full honors of the Church's last rites. They will usually be contented with the curtailed rite in that it helps them avoid a Protestant or lay service.

As regards the possibility of giving scandal to the faithful in allowing the curtailed rite to the doubtfully worthy, or to those who have led shameful lives, only to repent on their death bed, it must be admitted that what gives most scandal to the faithful is not the granting of limited religious rites to an unfortunate, but rather the granting of the identical rites both to those who have tried to lead a good life, and to those who, after a life of sin, are fortunate enough to die with the sacraments. The partial privation, by means of the curtailed rite, solves this problem.

We come now to the consideration of some problems that concern burial alone, independent of the religious rites. Is it ever possible to bury a non-Catholic spouse in a Catholic cemetery? By law it is forbidden, but here again, are there not circumstances that call for exceptions? I refer particularly to the case in which we have a non-Catholic member of a Catholic family, that is, a father or mother. We have so many such non-Catholic partners in mixed marriages, usually the husband, for a woman who is not converted at the time of marriage, most often has a religion of her own to which she is attached. These men have been friendly to the Church, helped support it, raised their children in it, but, somehow, have never joined it. If the husband had been a practicing Protestant, the Catholic family will have to go through a Protestant funeral. But if he was not a practicing Christian, that is, he now belongs to no religion, no matter what he once may have been, the Catholic family is in a quandary. They can bury their husband and father in a public cemetery, without any religious rites, or they can have a Protestant minister pray over him, both of which are repugnant. A simple solu-

tion of this problem is for the priest to say a few Our Father's and Hail Mary's at the funeral parlor, and for some layman to do the same at the grave in the family plot in the Catholic cemetery. No book should be used, for there must be no appearance of a substitute religious rite. This solution is now in use in some dioceses in those cases where there is a family plot, and where the deceased has been faithful to his prenuptial promises. This is not a privilege or a favor, but merely an attempt to prevent a greater evil by keeping the Catholic family out of the hands of ministers, and preventing their purchase of a family plot in the public cemetery. Permission for the burial should be obtained from the Ordinary.

But, it may be asked, is there not a danger of the violation of the cemetery if the non-Catholic is unbaptized? [58] It is true that the law borbids the burial of an infidel in blessed ground under penalty of violation. Now, violation of sacred ground does not mean the loss of the consecration or blessing, as Father Power reminds us in his work on cemeteries.[59] It does not essentially affect the sacred character of the cemetery. It does, however, bring with it a sort of moral defilement. Moreover, for violation of the cemetery, the burial of an infidel must be notorious (and some claim that the infidel must be a notorious infidel.) This means that the act must not only be a public violation of the law, but also one that is openly done in violation of authority practically speaking a forced burial of an infidel, against the protests of the Church officials. But when a bishop permits the burial of an unbaptized non-Catholic spouse in a family plot in the Catholic cemetery, to avoid a greater evil, there is no more moral defilement of that cemetery than there is defilement of a church in the administering of the sacrament of Matrimony to a heretic therein, or the marrying of an infidel in church, as in the case of mixed marriages, celebrated in the church with

[58] Cc. 1172, § 1, 4° and 1207.

[59] *Op. cit.*, p. 170.

permission of the Ordinary. All these procedures must not be confused with privilege or favor; they are necessary tolerations to prevent greater evil.

These procedures, i.e. the private prayers at the funeral parlor and the burial of the non-Catholic in a family plot, seem the more justified today in view of a reply of the Holy Office to the Apostolic Visitor for the Ukrainians in Germany in 1941. The Holy Office was asked whether a Catholic priest could give Christian burial to the Orthodox when they cannot have the assistance of their own clergy. The reply stated that c. 1240 was to be observed as regards those who are refused Christian burial, but it added that "the priest might, without any sacred vestments or rites, recite prayers privately at the house where the body is laid out, accompany the funeral for the sake of civil courtesy, and also recite prayer privately at the grave in the cemetery, avoiding all occasion of scandal." [60]

The request for the burial of the unbaptized infants of Catholic parents always presents a tough problem for the pastor. The law states that infidels may not be buried in Catholic cemeteries, as we have already seen, without danger of violation of the cemetery. But many authors maintain that the infant child of Catholic parents, unbaptized through no fault of theirs, is really to be considered as destined for Baptism, and is therefore hardly an infidel in the strict sense of the term. Father Power, in his thesis on cemeteries, treats of this controversy thoroughly, and states that, because of the controversy among the authors, there is a *dubium iuris*, and therefore "it seems that the burial of such children in blessed ground will not violate that ground." [61] Certainly, it is better to provide a separate place for these infants, but most of our people simply cannot be made to understand the legal basis for the denial of burial of their unbaptized infant in the

[60] *Canon Law Digest*, Vol. III, p. 300.

[61] *Op. cit.*, pp. 180, 181.

family plot, and, not infrequently, an outright refusal results in real bitterness, if not actual defection from the Church. Beste, in his "*Commentarium In Textum*", cites the Holy Office, in a decree of 1859, as stating that, to avoid a greater evil, the burial of non-Catholic relatives (he does not distinguish between baptized and unbaptized) in family plots may be *passively tolerated.* He adds that, in his opinion, where bitterness, alienation from the Church and other grave inconveniences are to be feared from the refusal of burial of non-Catholic relatives in the family plot, such burial is still licit for the same reasons as those given by the Holy Office.[62]

One last subject that is of interest in this discussion, is that of the "brother and sister" arrangement, when one of the partners dies. Here is a case that illustrates the most important principle in the law on the privation of Christian burial; and that is this: a person's right to Christian burial depends upon his public status before the Church, not his status before God. If the invalidity of the marriage is public and notorious, he is a public and manifest sinner and will thus incur full or partial privation, unless there is a sign of repentance that can be related to the concubinage, and can be made known. Whether the publication of the ecclesiastical approval of the arrangement will remove the scandal, or possibly cause scandal, will depend too much on the circumstances of persons, places and times, for a general solution of this problem. If the invalidity of the union is not publicly known, there is no reason for the refusal of Christian burial.

In conclusion, I should like to make my own the words of a former Chancellor who wrote on the subject of "More Christian Burials" in 1948: "We priests are on dangerous ground every time we treat a burial problem, however clear-cut or simple it may appear to be. Grave scandal, apostasy, harm to religion, hatred of the priesthood—these are the very real concomitants of a careless judgement or of a cold or 'official'

[62] P. 616.

treatment of the cases that come within our province. Our only safe refuge is in a sound knowledge of the law and approved commentaries, consultation with superiors and men learned in the law, a clear understanding of the particular circumstances of each case, gained from personal attention, and, finally, an inexhaustible patience, kindliness, and charity towards the afflicted loved ones of the deceased, however unreasonable and vexatious they may be in the excess of their grief and disappointment. Indeed, the more recalcitrant they are, the more they are a challenge to our priestly hearts." [63]

Charles A. Kerin, S.S.

[63] *AER*, CXVIII (1948), pp. 401-408.

PERMISSION TO WRITE FOR PUBLICATION: A DISCUSSION OF CANON 1386

Part II *

C. *Are religious publications included?*

1) status of the question

BEFORE embarking upon the next section of this study, it will be helpful to repeat the wording of canon 1386, § 1: "Secular clerics are forbidden to publish any books [also] on secular topics or to contribute to or edit daily papers or periodicals, pamphlets or booklets, without the consent of their Ordinaries; religious need the consent of both their own major superior and the local Ordinary." The word "also" in brackets is my own addition to Woywod's translation: it is an attempt to indicate the problem here involved. In the original the canon reads, "*libros quoque de rebus profanis.*" Hence it is debated whether the concern is with religious as well as secular material. Some canonists maintain that the "*quoque*" yields the reading, books concerning secular things "also," which implies that religious works are included. Gagnon, who has written a doctoral dissertation on censorship and permission, tells us, when he comes to this part of his dissertation: "few authors enter into the discussion." Mahoney describes this point as "the vexed question." [47] Both observations are indeed well founded.

A number of volumes on Canon Law simply paraphrase the wording of canon 1386, § 1 without making it fully clear, at least to this observer, just what might be the thought of the authors. That the commentaries do not expressly mention

* This is the concluding section of this Article, Part I of which appeared in the April number of the current year.

[47] Gagnon, *op. cit.*, n. 253, p. 128; Mahoney, *Clergy Review*, VII, p. 252.

religious works, is probably not a sufficient basis to say that religious works are excluded; the door is left open for their inclusion; a position reflecting the wording of the canon itself.

Among commentators opinion seems to favor the inclusion of religious material. Wernz-Vidal, Prümmer, De Meester, *Periodica*, Vermeersch-Creusen, Coronata, Hannan, Jombart, Woywod, Haring, Brys, and Mahoney include religious writings either expressly or by implication. Of these, only Vermeersch in *Periodica*, Wernz-Vidal, and Mahoney enter into anything resembling a discussion. As indicated in the footnote,[48] the others simply state, at times obliquely, their opinion. The following limit the canon to profane writings: Blat, Gagnon, Demol, Gillet and Sipos. Of these, only Gillet and Gagnon discuss the question.[49]

[48] "Quoscumque libros etiam profanos," Prümmer, *op. cit.*, q. 415, p. 497; "respicit quoque libros argumenti sacri," De Meester, III, pars II, fn. 2, p. 261; "de quacumque materia," Vermeersch-Creusen, *Epit.*, II, n. 728, p. 395; "extends to every kind of writings, even such as deal with purely secular matters," Woywod, *Homiletic and Pastoral Review*, XXVIII (1928), p. 864; "a secular priest who has obtained the permission for the publication of a religious book from a local Ordinary who is not his own local Ordinary needs an additional permission from the latter . . . ," Abbo-Hannan, *op. cit.*, II, p. 619; "Haec praescriptio respicit quoque libros argumenti sacri," Brys, *op. cit.*, II, fn. 1, p. 198; "Si liber seu scriptum praeviae censurae subiectum . . . videtur, praeterea requiri, etiam pro clerico saeculari, licentia scriptum edendi proprii Ordinarii. Haec interpretationem . . . suadet conjunctio quoque . . . ," Coronata, *op. cit.*, II, n. 955, p. 319; Jombart, *DDC*, III, col. 167; Sipos (p. 752) cites Haring, *Theoligisch-Praktische Quartalschrift*, 1932, p. 822. Beyond what I have here quoted, these references contain no further explanation. Later I shall treat in detail the arguments of *Periodica*, XI (1923), (15)-(17), Wernz-Vidal, *op. cit.*, IV, pars II, fn., p. 145, Mahoney, *Clergy Review*, VII, 251-253.

[49] "'Qui de rebus profanis tractent' nullo modo comprehensis sub 1ª § can. 1385, 'edere' . . ." Blat, *op. cit.*, III, pars IV, n. 274, p. 335: "Quia nimiam vim tribuit coniunctioni 'quoque' et quia valde differt a normis *Off. ac mun.*," Sipos, *op. cit.*, n. 166, p. 752. Later I shall adduce the reasonings of P. Gillet, "De Censura Librorum," *Jus Pontificum*, XI (1931), 59-61, and of Gagnon, *op. cit.*, pp. 128-130. I have not yet been able to obtain the Louvain dissertation of G. Demol, circa 1929, which Gillet cites as defending this viewpoint. An account in the *Conference Bulletin of the Archdiocese of New York*, VI (1926), 54 spoke of "permission for books which treat *de rebus profanis*."

2) papers and periodicals

Regarding periodicals and newspapers, Wernz-Vidal argue that, since the canon makes no distinction between profane or religious—merely, stating, without any limitation, periodicals and newspapers—we have no right to do so either. They note that clerics and religious—who would be expected to serve religious publications—are the exclusive subjects of this section, and they refer to history the objection that clerics are above reproach in their editing of religious publications. Apart from the matter of legal cogency, this view of Wernz-Vidal has a practical advantage; it eliminates having to decide whether certain newspapers, and especially periodicals, are religious or profane.[50] De Meester agrees that religious papers or periodicals are included. In the regulation of the Council of Malines, which required clerics to obtain episcopal permission before contributing material of an important religious nature, he finds this interpretation reflected.[51]

A decree of the Sacred Congregation of the Council applied the canon to religious papers and periodicals. Concerned with the publication of favors and offerings in pious papers, this decree instructed Ordinaries that they should "in accordance with canon 1386, duly and strictly subject the writings of these papers to ecclesiastical censorship in advance . . . ." [52] While the word "censorship" is used, the reference to canon 1386 is explicit. Religious periodicals or papers had been included by commentators, e.g., Hurley, Vermeersch, Boudinhon, Péries, Hilgers, in their interpretation of article 42 of *Officiorum ac munerum*, the predecessor of canon 1386, § 1, although differing in that it restricted only the *editing* of these publications.[53] Such inclusion had also been the tenor

[50] Wernz-Vidal, *op. cit.*, IV, pars II, fn. 33, pp. 144-145.

[51] De Meester, *op. cit.*, III, pars I, n. 1343, pp. 261-262.

[52] 7 Junii 1932, *AAS*, XXIV, 240; Rev. T. Lincoln Bouscaren, *The Canon Law Digest* (Milwaukee, 1934, ff.), I, 597—cited hereafter as *CLD*.

[53] "Iidem prohibentur quominus, absque praevia Ordinariorum venia, diaria vel folia periodica moderanda suscipiant." Italics added in text. Vermeersch,

of previous particular law as found in the Councils of Avignon, Lyons and Aix.[54]

Undeniable wisdom marks the insistence of the Code that clerics and religious obtain permission before undertaking the role of regular contributor or editor. Either position would be a sizeable task; no less so, were the paper or periodical a worthwhile religious one. It is possible that certain papers and periodicals, that might be called religious rather than secular, escape the censorship legislation of canon 1385. If they were not covered by canon 1386, § 1, the cleric, left to himself, might become enmeshed in literary extracurricular activities for which he had neither ample time nor sufficient talent. Generally the mode of life imposed by the priestly state is "not the occasion for writing books or articles, but of leading a life of prayer and apostolic work as is befitting men of the Church. The Church permits its priests and at times commands them to cultivate the profane sciences, but she does not wish that this be done without discernment and to the detriment of more fundamental obligations which are proper to the priest." [55] Consequently the right order of obedience, the efficient and complete fulfillment of appointed

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De Prohib., p. 105; Hurley, *op. cit.*, p. 229; Boudinhon, *La nouvelle législation*, p. 267; M. G. L'Abbé G. Péries, *L'Index* (Paris, 1898), pp. 209-210; Joseph Hilgers, "Censorship of Books," *Catholic Encyclopedia*, III (N. Y., 1908), p. 526; Pennacchi opposed the inclusion, *ASS*, XXX, 511. Pennacchi, Vermeersch, and Hurley did not extend article 42 to reviews (*révues*), either secular or religious; Boudinhon, Péries, Gennari (*Il Monitore Ecclesiastico*, X (1897), 88) did.

[54] *Conc. Lugd.* 1850 cap. XXVIII, n. 3, *Collect. Lac., IV*, 487; *Conc. Avenion.* 1849, cap. V, *Collect. Lac.*, IV, 323. The Council of Aix is cited by Rev. A. Arndt, S.J., *De Libris Prohibitis Commentarii* (Ratisbonae, 1895), p. 273. There is a recapitulation of source material for Canon 1386 in *Documentation Catholique*, XXI (1929), cols. 86-89.

[55] "Queste obbligazioni non sono punto di scrivere libri o articoli, ma di condurre una vita di preghiera et di apostolato, come si conviene ad uomini ecclesiastici. La Chiesa permette ai suoi sacerdoti e talvolta lore comando di coltivare le scienze profane, ma essa vuole che cio non sia senza discernimento ed a detrimento delle obbligazioni fondamentali che sono proprie del sacerdote." Msgr. Angelo Grazioli, "Censura e Licenza nelle Publicazioni dei Sacerdoti," *Palestra del Clero*, Rovigo, 1929, p. 22.

duties, require that canon 1386, § 1 extend to religious papers and periodicals. To be realistic, how many priests in the United States serve as editors of secular papers or magazines? Many do serve as editors of religious papers or periodicals. Were canon 1386, § 1 restricted to secular publications, it would lose much of its meaning for us. Therefore, in practice, before undertaking to edit a religious or secular paper or periodical, a cleric or religious should obtain the bishop's permission. This would be true even if he served on the staff, not necessarily as editor-in-chief, but as an assistant editor. He should obtain permission also for a role less than assistant editor, namely, serving as a collaborator in the project, a regular contributor. Sometimes the bishop gives permission to put out a paper or periodical, not to an individual, but to a group of clerics or religious. In such a case, since the bishop directs his action to all in the group, each member enjoys permission to write for the publication. After the organ has been established, should an outside cleric be brought in as a regular contributor, he would have to obtain permission from the bishop.[56]

I have not seen any canonists who have written in explicit opposition to the view that canon 1386, § 1 includes religious publications when it enjoins clerics and religious from becoming regular contributors or editors without episcopal permission. Unless I have misread the writings of Gagnon and Gillet, although they seek to limit the permission of the canon in the case of books to secular ones, they make no attempt to exempt periodicals or papers of a religious nature. It is to the question of books, that we now turn.

3) books

a—the meaning of "also" (*quoque*)

Pro—Canonists seeking to justify the inclusion of religious books emphasize the word "also." Why say secular books "also," if they alone are included?"[57] Con—Canon 1385

[56] Wernz-Vidal, *op. cit.*, IV, pars II, fn. 34, p. 145.

[57] Vermeersch, *Periodica*, XI, p. (15); Coronata, *op. cit.*, II, n. 955, p. 320; Mahoney, *Clergy Review*, VII, p. 252.

had required that all, cleric and lay alike, obtain previous censorship for religious books. By Canon 1386, § 1 clerics and religious must "also," i.e., in addition to, or beyond, the censorship requirement, receive episcopal permission when they publish profane books. "Also" contrasts the obligation of all with that of clerics; while all submit to censorship, clerics must also obtain permission for profane books.[58] Sipos criticizes the inclusion of religious books because it establishes a serious, far-reaching obligation upon a mere conjunction of doutful meaning.[59]

b—the old law

Because of this puzzlement over the meaning of "also" it is fitting we examine the old law which, commentators on both sides agree, is article 42 of *Officiorum ac munerum*. It reads: "No one belonging to the secular clergy is to publish a book treating even [*ne quidem*] of arts or natural sciences without previously having consulted his bishop; and he is bound to do this in order to give an example of willing obedience to him."[60] Here, as will be apparent, the "also" (*quoque*) argument is transferred to the meaning of "even" (*ne quidem*). Pro—Those who include religious books maintain that to say secular clerics can not "even" publish profane books, implies religious books as well; otherwise, why the "even?" Other articles of the same Constitution had imposed upon all the censorship of religious books (art. 41)[61]

[58] Gagnon, *op. cit.*, n. 255, p. 129; Gillet, *Jus Pontificum*, XI, p. 60.

[59] Sipos, *op. cit.*, n. 166, p. 752.

[60] "Viri e clero saeculari ne libros quidem, qui de artibus scientiisque mere naturalibus tractant inconsultis suis Ordinariis publicent, ut obsequentis animi erga illos exemplum praebeant." The English rendition above is found in Hurley, *op. cit.*, p. 221.

[61] "Omnes fideles tenentur praeviae censurae eccelsiasticae eos saltem subjicere libros, qui divinas scripturas, sacram theologiam, historiam ecclesiasticam, jus canonicum, theologiam naturalem, ethicen, aliasve hujusmodi religiosas aut morales disciplinas respiciunt, ac generaliter scripta omnia, in quibus religionis et morum honestatis specialiter intersit."

by the Ordinary of the place of publication (art. 35).[62] Hence the meaning of article 42 is that in addition to censorship, which must be obtained by all from the Ordinary of publication, secular clerics cannot publish any books without consulting their own Ordinary, and this is so " even " if the books are merely on profane topics.[63] The *ratio* of article 42 is clearly stated: " he [the cleric] is bound to do this to give an example of willing obedience." This seems unfulfilled, unless permission is obtained for religious books. Con—That this explanation is telling and enjoys the authority of eminent canonists[64] is conceded even by those who disagree, e.g., Gillet, while challenging the view, neither denies its probability nor offers his own objections as apodictic. His opinion is, that after article 41 disposed of books on censorable topics, the next article of the Constitution continued on to the matter of profane books. On the subject of profane books, article 42 stipulated that when these were written by the secular clergy, " even " though dealing with the merely profane, they needed the permission of the Ordinary.

In weighing these divergent views, we must remember that article 42 of *Officiorum ac munerum* applied only to secular clerics and required only consultation. This may weaken somewhat any appeal to the fact that approved pre-Code authors (canon 6, n. 2) interpreted article 42 to include religious books. However, canon 6, n. 3 provides that those canons, agreeing in part with the old law, may, in that agreement, be estimated from the old law (Gillet, *Jus Pontificium,* XI, pp. 59-60). Gagnon, who shares Gillet's reading of canon 1386, § 1, makes no mention here of *Officiorum ac munerum.* In

62 "Approbatio librorum, quorum censura praesentium decretorum vi Apostolicae Sedi vel Romanis Congregationibus non reservatur, pertinet ad Ordinarium loci in quo publici juris fiunt."

63 Boudinhon, *La nouvelle législation,* p. 264.

64 Mahoney, *Clergy Review,* VII, p. 252, Hilgers, *Cath. Ency.,* III, p. 526, Péries, *L'Index,* pp. 209-210, Hurley, *op. cit.,* p. 222, seem to include religious books but do not enter into any discussion of the question as does Boudinhon, *La nouvelle législation,* p. 264, who expressly includes them.

an earlier section of his dissertation, in discussing pre-Code legislation, he considered the encyclical of Pius IX, *Pieni l'animo,* to be the nearest inspiration of canon 1386 and quoted the passage: "Senza il previo assenso dell'Ordinario, niuno del clero può pubblicare scritto di sorta, sia di argomento religioso o morale, sia di carattere meramente tecnico," (Pii IX, *Acta,* III, 172; *Fontes,* n. 676, p. 680; Gagnon, *op. cit.*, n. 102, p. 56). As this would not support old-law justification to limit canon 1386, § 1 to secular books, Gillet points out, lest any use the text against him, that the only universal law before the Code was *Officiorum ac munerum.*

c—canon 1385, § 3

Pro—Returning to the new law of the Code, canonists who require permission for religious books claim support from canon 1385, § 3, which instructs members of religious congregations to obtain permission from their own superiors before publishing a book on a religious topic. It does not instruct secular clerics to get the same permission from their Ordinaries. That apparent discrimination is remedied, says Vermeersch, by canon 1386, § 1, provided the canon is interpreted to include religious books. Such an analogical approach is justified by the principles for interpretation of the Code laid down in canon 18.[65]

Con—Those opposing also note that canon 1385, § 3 makes members of religious congregations obtain the permission of their own superiors to publish religious books. As Gagnon points out, however, if canon 1386, § 1 includes religious books, then the Code is telling the members of religious congregations a second time to obtain the permission of their superiors. To do so would be, in his words, a meaningless duplication, a legal incoherence. Why have canon 1386, § 1 tell them what they have already been told by canon 1385, § 3? [66] Objection —Those favoring the inclusion of religious books concede the

[65] Vermeersch, *Periodica,* XI, p. (17).

[66] Gagnon, *op. cit.*, n. 254, p. 129.

wording of the law is not happy here, but deny that it is superfluous. Canon 1386, § 1, Vermeersch observes,[67] directs religious to obtain the permission of their superiors for profane books which canon 1385, § 2 had not included. It also subjects their writings to the Ordinary of the place where their convent or monastery is situated. Standing alone, canon 1385 would have permitted them to by-pass that Ordinary.

d—permission vs. censorship

Pro—Another argument, developed by those wishing canon 1386, § 1 to include religious books, rests on the distinction between censorship and permission; censorship (1385) applies to religious material, permission (1386), seeking the obedience of subordinates, applies to either type of writing. Such obedience, Vermeersch contends, would be only partial did not canon 1386, § 1 cover religious books. Either canon 1386, § 1 includes religious books, or the bishop of the diocese is in the anomalous position of possessing less power over the religious writings of the secular clerics and members of religious congregations than he does over their profane writings.[68] Con—What is unreasonable, Gagnon asks, in the law's demand for censorship of works on sacred topics and permission only for the less important profane books?[69] He maintains that, when a cleric submits his work to censorship, there is an inherent obedience; obedience to the authority of the episcopate, although a bishop other than the Ordinary of the place of the author may censor. Episcopal authority is here *in globo*, e.g., B may censor A's subjects and vice versa; a convenient and somewhat necessary arrangement because of the location of publishing firms. What is the point of multiplying obediences, of pyramiding obstacles? Must the religious cleric, after the consent of his superiors and previous censorship, seek a third assent from the local bishop? Further, this would

[67] Vermeersch, *Periodica*, XI, p. (17).

[68] Vermeersch, *Periodica*, XI, p. (16).

[69] Gagnon, *op. cit.*, nn. 254-255, pp. 128-129.

in practice deprive the secular cleric of the choice of the three censorship Ordinaries, which canon 1385, § 2 granted him, for he would have to submit his religious book to his own Ordinary for permission. It is better, therefore, to exclude religious books from canon 1386, § 1.

e—a *casus conscientiae*

Pertinent to this discussion is the *casus conscientiae* describing a secular cleric who has written a number of religious books, all of them submitted only to the Ordinary of the place of printing. This displeases his own bishop; a displeasure increased when the cleric justifies himself by citing canon 1385, § 2. Vermeersch, taking the side of the bishop, maintains that religious books are included in canon 1386, § 1 and warns that, were it otherwise, obedience would be weakened and harmful diocesan consequences might follow. It is his opinion that even though the books might be impeccable dogmatically, the Ordinary can best determine whether they should be published, e.g., proper devotion to assigned duties in the diocese might not permit the cleric time to write, or a rebellious cleric might utilize the plaudits accruing from authorship to laud himself over the bishop. Reasoning thus, Vermeersch concludes that the cleric should get permission from his own Ordinary, who, in this instance, can forego repeating censorship and need not issue his consent formally in writing.[70]

This exposition is challenged by Gagnon,[71] who observes that by individual precept or particular law the bishop can impose restrictions upon rebellious clerics, harmfully employing publication talents. He suggests also that discreet impetration might persuade the other bishop, who had granted the *imprimatur*, not to act upon future works of the offending cleric. Gagnon doubts that a priest is comfortably idling

[70] Vermeersch, *Periodica*, XI, pp. (15)-(17). Other canonists also require permission from the proper Ordinary, Hannan, *op. cit.*, II, p. 619; Coronata, *op. cit.*, II, n. 955, p. 319; Jombart, *DDC*, III, col. 167.

[71] Gagnon, *op. cit.*, n. 255, p. 129.

away time when some of it is devoted to composing a worthy book useful to the cause of religion. He cautions that the approach of Vermeersch might lead to refusals of the *imprimatur* under the pretext that it is improper for the cleric to write. It is the contention of Gagnon, that in practice Vermeersch finally comes around to his own view anyway, when Vermeersch concedes that a secular cleric can presume permission after another Ordinary has successfully censored the book.[72]

f—conclusion

To conclude this rather involved *excursus,* it appears that the greater number of authors want religious books included in canon 1386, § 1. For practical purposes, this means that if cleric Titus of diocese X wrote a religious book, he would have to obtain permission to publish the book from the Ordinary of diocese X. This permission would be necessary even if his book had successfully passed the censorship of the Ordinary of diocese Y, where the book had been printed or published. None the less, the evidence for this position is not absolutely conclusive; sound canonical reasoning and worthy commentators uphold the contrary opinion. Since this is so, canon 19 can be legitimately invoked. Intended to guide us in analyzing the Code, canon 19 tells us that penal laws, laws restrictive of the exercise of freedom, are to be strictly interpreted. Applying this principle to canon 1386, § 1, it does not seem necessary to include religious books. In practice, "the more liberal explanation . . . may safely be followed," as Canon Mahoney points out.[73] Such is also the

[72] In the commentary of Augustine there is a paragraph which apparently deals with a secular cleric whose Ordinary has refused permission for a profane book. *A fortiori* the case would also seem to apply were the book of a religious nature. Augustine's first recommendation is that the cleric should simply acquiesce; then, despite his own stand that canon 1386, § 1 includes religious books, he writes: "The author has another expedient, namely that offered in canon 1385, § 2; which allows him to seek another publisher or printer. In doing so an author would only be claiming a natural right (p. 443)." In the words of Vermeersch, "Id nos plane fugit."

[73] Mahoney, *Clergy Review,* VII, p. 252.

conclusion of Gillet, who says—quite fittingly after his own penetrating exposition of the problem — that the liberal opinion, excluding religious books, is not at all adverse to, or against, the text of canon 1386, § 1.[74] Cleric Titus, therefore, need not obtain permission to publish his religious book from the Ordinary of diocese X. If the book required censorship, it is sufficient that he has obtained that censorship from the Ordinary of diocese Y; he needs no further permission.

Both Mahoney and Gillet hasten to caution their readers not to exceed this conclusion by further deducing that a cleric would possess a positive permission or right to publish religious books without the consent of his Ordinary: "*Absentia obligationis non est aequiparanda permissioni.*" Hence, the Ordinary does not act against the Code, but is perfectly within his legal rights—should such be his resolve—in enacting a positive statute binding his subordinates to submit to him, for his own permission, religious books as well as profane. Following through the example employed above, the Ordinary of diocese X could promulgate a statute calling upon Titus to obtain his permission before publishing the religious book, regardless of whether it enjoyed previous consorship.

D. *From whom is this permission obtained?*

1) for secular clerics

Another question raised by canon 1386, § 1 is from whom must secular clerics and the members of religious communities obtain this permission, apart from censorship, to publish books and to edit or act as a contributor to newspapers or periodicals? For secular clerics the canon directs that the permission be obtained from " their own Ordinaries " [*suorum Ordinariorum*]. Who is the Ordinary of the secular cleric within the meaning of this canon? 1) The Ordinary of the diocese in which the secular cleric is incardinated can certainly give this permission. No canonist doubts this; whether another bishop can likewise give it, is disputed. De Meester, Sipos, Brys, Beste, Augustine and Claeys Bouuaert-Simenon

[74] Gillet, *Jus Pontificum*, XI, p. 60.

restrict the permission to the Ordinary of the diocese of incardination.[75] Contending that such is the practice of the Code, they cite canons 112 and 114, which discuss incardination and excardination, canon 139, which restricts certain affiliations the cleric might seek, canon 114, which speaks of the military, and canon 144, which provides for the recall of a cleric to his diocese. In these canons, "own Ordinary" signifies only the Ordinary of incardination; so in canon 1386, § 1, they maintain, it has the same meaning.

2) The Ordinary of the diocese where the cleric has a domicile or quasi-domicile. This view is advocated by Vermeersch-Creusen, Coronata, Jombart, Mahoney, Gagnon and *Collationes Brugensis*.[76] Maintaining that "own Ordinary" in canons 112, 114, 139 and 144, is used in a sense different from that of canon 1386, § 1, they appeal instead to canon 94, "Either through domicile or quasi-domicile each one chooses his own Ordinary." In defense of the same opinion, Gagnon cites also canon 13, § 2, which rules that those possessing a domicile or quasi-domicile are bound by the laws of that territory.

Apparent corroboration for the view of these canonists is found in a decree of the Sacred Congregation of the Council that a priest, who goes to a teaching post in another diocese, must call upon that Ordinary "whom, according to canon 94, he must regard as his own Ordinary as long as he remains in

[75] De Meester, *op. cit.*, III, pars I, n. 1343, p. 261; Brys, *op. cit.*, II, n. 830, p. 198; Beste, *op. cit.*, p. 698; Augustine, *op. cit.*, VI, p. 441; Gillet, *Jus Pontificum*, XI, p. 59; Sipos, *op. cit.*, n. 166, p. 752. F. Claeys Bouuaert-G. Simenon, *Manuale Juris Canonici*, editio quinta, III (Gandae et Leodii, 1943), n. 183, p. 136.

[76] Vermeersch-Creusen, *Epit.*, II, n. 728, p. 395; Coronata, *op. cit.*, II, n. 955, p. 319; Jombart, *DDC*, III, col. 167; Gagnon, *op. cit.*, n. 250, p. 126; *Collationes Brugenses*, 1928, p. 37; Mahoney, *Clergy Review*, VII, p. 252. It is not clear that Blat (*op. cit.*, III, pars IV, n. 274, p. 335, cf. Gagnon, *loc. cit.*, and Ayrinhac, *op. cit.*, n. 233, p. 281) and Augustine ("the secular clergy need the permission of the bishop to whom they are subject . . . If we say 'to whom they are subject' we mean habitually or legally, by virtue of incardination," *op. cit.*, VI, p. 441, cf. Gagnon, *loc. cit.*) can be cited for this opinion.

that place." [77] The strength of the above arguments and the authority of their proponents permit this probable opinion to be followed. It is of practical consequence to secular clerics studying or teaching at a university outside their diocese; clerics occupying distant N.C.W.C. posts or on loan outside their diocese; secular priests from a foreign country developing an incardination yet unachieved. All of them may obtain the permission of canon 1386, § 1 from the Ordinary of the place where they have their quasi-domicile.

2) for religious

The parallel question concerns the members of religious congregations; from which Ordinary must they obtain permission? Canon 1386, § 1 says from the "local Ordinary," i.e., from the Ordinary of the place. For them, who is the "Ordinary of the place," in the sense of canon 1386, § 1? 1) The Ordinary of the place wherein is located the religious house to which the religious is juridically attached. That this bishop can give the requisite permission to the religious, exempt or non-exempt, I have not seen challenged by any canonist.

2) The Ordinary of the place in which the religious has a domicile or quasi-domicile. Defending the right of this bishop to give them permission, are Gagnon, Woywod, Wernz-Vidal and Augustine.[78] Their appeal is to canon 94 in the manner illustrated above in the case of the secular cleric. Since this opinion has the status of at least a probable one, safe to follow, the members of religious congregations, who go to a particular diocese to engage in parish work, teaching, study, etc., may ask the required permission from the Ordinary of that diocese.

3) Either of the three Ordinaries of canon 1385, § 2 viz., of the place of printing, of publication, of the author. Here is the area of debate. Championing this view, are Cappello,

[77] 22 Feb. 1927, *AAS*, XIX, 99-101; *CLD*, I, 116-119; cf. Gagnon, *op. cit.*, n. 250, p. 126.

[78] Gagnon, *op. cit.*, n. 251, p. 127; Woywod, *Homiletic and Pastoral Review*, XXVIII, p. 865; Wernz-Vidal, *op. cit.*, IV, pars II, n. 715, p. 145; Augustine, *op. cit.*, VI, pp. 441-442; this may also be the view of other commentators whose phraseology is difficult to interpret.

Wernz-Vidal, Blat, Vermeersch-Creusen, Augustine;[79] Beste and Ayrinhac cite it without disagreement.[80] Gillet, Gagnon and Coronata expressly oppose the view.[81]

Only Vermeersch-Creusen and Wernz-Vidal offer detailed argument that the three Ordinaries of canon 1385, § 2 fulfill the definition of "Ordinary of the place." Vermeersch-Creusen admit that "Ordinary of the place" *per se* means the Ordinary where the house to which the religious belongs is located. Because the canon does not add the words "in which is the house," Vermeersch-Creusen argue that there is the option of including the Ordinary of publication or of printing; particularly, since the religious has already signified his personal obedience by obtaining the consent of his own major superior. Unless the option of the three Ordinaries has solid probability, they feel that the law becomes very severe. Vermeersch-Creusen caution, however, that should the Ordinary wish to make the religious obtain his own permission he could do so.[82] Wernz-Vidal, in their commentary, press the distinction, that while the "Ordinary of the place" might be the proper Ordinary of the nonexempt religious, he certainly is not of the exempt religious. From any rashness in publication, the exempt are sufficiently checked, they contend, by dependence on their own proper superiors or [*seu*] Ordinaries.[83]

This extension of the three Ordinaries to canon 1386, § 1 is opposed, as we noted above, by other canonists. Gagnon says that the option of canon 1385, § 2 represents an express privilege conceded specifically for censorship; regarding such a privilege, canon 1386, § 1 is silent; that choice is not offered for permission apart from censorship. To stretch the privilege of one canon, concerned with one thing, to another, concerned

[79] Cappello, *op. cit.*, II, n. 508, p. 482; Wernz-Vidal, *loc. cit.*; Blat, *op. cit.*, III, pars IV, n. 274, p. 335; Vermeersch-Creusen, *Epit.*, II, n. 728, p. 395; Augustine, *loc. cit.*

[80] Beste, *op. cit.*, p. 698; Ayrinhac, *op. cit.*, n. 233, p. 281.

[81] Gillet, *Jus Pontificium*, XI, p. 59; Gagnon, *loc. cit.*; Coronata, *op. cit.*, II, n. 955, pp. 318-319.

[82] Vermeersch-Creusen, *Epit.*, II, n. 728, pp. 395-396.

[83] Wernz-Vidal, *op. cit.*, IV, pars II, n. 715, 144-145.

with something else, is gratuitous. "Ordinary of the place," when read by Gagnon, clearly intends what the words themselves plainly say; the Ordinary of printing or publication is not mentioned in canon 1386, § 1. Positive proof of some sort, he concludes, is needed to justify such an extension, and until it is forthcoming, two additional Ordinaries are incompatible with the stated direction of the canon.[84]

Others, sharing Gagnon's viewpoint, argue that to extend the three-fold option to canon 1386, § 1 involves an inconsistency. Vermeersch is charged with saying, on the one hand, that the religious can choose either of the three Ordinaries, yet on the other hand, that the Ordinary of the place has the right to make the religious obtain permission, apart from censorship, from himself alone. How, asks Gillet, granting the religious does have this choice as a concession from general law, can the bishop have the power to act against the general law? Would it not be in violation of the Code to deny this concession?[85]

Such are the arguments, pro and con, about this last point of canon 1386, § 1; a thorny deliberation making clear-cut conclusions difficult. Doubtless, different minds will conclude differently whether the member of the religious congregation can or cannot obtain permission, apart from censorship, from the Ordinary of printing or publication. Here the burden of proof is upon those who maintain that the religious can do so; the present writer feels that convincing proof has not been forthcoming. Yet, it seems undeniable that the religious,

[84] Gagnon, *op. cit.*, n. 251, p. 127. "Religiosorum moderatores de gravissimo officio monemus numquam sinendi aliquid a suis subditis typis edi, nisi prius ipsorum et Ordinarii facultas intercesserit." These words of *Pascendi* were followed by an instruction to the Ordinary—one would judge of the place of the religious house—to act if the superiors did not. Woywod, on the basis of a 1918 Holy Office Decree (*AAS*, X, 136; *CLD*, I, 50-51) retaining the Council of Vigilance and Oath against Modernism, considers *Pascendi* still in force, *Hom. and Past. Rev.*, XXVIII, 866. Gagnon (n. 397, p. 215) is skeptical; Jombart (*DDC*, III, col. 161) and Coronata (n. 955, p. 319) urge it at least as a directive norm.

[85] Gillet, *Jus Pontificium, loc. cit.*

finding this choice offered to him in the commentaries of Wernz-Vidal, Vermeersch-Creusen, Cappello, Blat, Augustine, Beste and Ayrinhac, can, quite inculpably, follow that choice. However, should the local bishop challenge that choice, he certainly acts within his rights, because the choice is not a forthright concession of general law; the bishop's denial of that choice would be rather a clarifying application of a cloudy legal point. And this is probably the explanation of the statement by Vermeersch that the bishop has the right to so act.

Epilogue

Because, at one time or another, they were of practical moment to him, the present writer has addressed himself to these questions. It seemed logical to him that others, too, when they desired to set pen to paper, would face similar questions. To them also, the attempted answers may be of possible assistance.

As through life the cleric pursues his own particular path, periodically he encounters situations that might be alleviated or righted, at least so it seems to him, were he to sit down and write a letter, a small or large article, even perhaps a pamphlet or full-length book. Because of his spirit of obedience, the cleric wonders if, on his own, he has the right to do so, or whether such writings are better left to higher authorities. What permissions he ought to obtain, should he decide to go ahead; how, when, and where they are obtainable, are also matters of concern. In consulting the few canon law volumes, to which his personal library is necessarily limited, he might well come away rather uncertain of mind. Going beyond his own shelves, his strong impression is that of envelopment in a baffling legal labyrinth. In either case, since all along he has been debating whether or not to take action, the outcome may be a resigning himself to the safe course of doing nothing.

Such a finale is unfortunate: it is this zealous, obedient, conscientious cleric, who should get into print. His opposite, not too Code-conscious, sometimes leaps to the inkwell, leaving on the public record theology and grammar unflattering to the Church. It would be a fine thing to have the temper-

ate, informed cleric putting his views into print more often. Beyond a doubt the present is an age of propaganda—and propaganda has its effect. In our newspapers and magazines there is no dearth of evidence that those lacking our faith, and those of no faith, are making their points for the public eye. There is a dearth of evidence in the same vehicles that those of our own ranks have made their voice heard as often, or perhaps as well. Writing has always been a recognized segment of the total apostolate. It is hoped that this article, with its effort to expose and clarify the canon law dealing with the matter of writing for publication may help to overcome an unfortunate reluctance and hesitancy apparently inhibiting learned, prudent clerics—traceable sometimes to vague canonical fears—and encourage a greater future output from which the cause of Christ will benefit. How pleasant a surprise it was to discover—strayed from its native Baltimore to the work of a French scholar—this following quotation, with its elegant beauty both of phrase and sentiment. May the words of our Third Plenary Council be honored today in their own country:

Eos igitur clericos et laicos omni laude dignos habemus, qui aut libris (sive parva, sive magna mole) scribendis, aut ephemeridibus concinnandis, rem catholicam apud nos hactenus tutari et amplificare contenderunt. Praeclara eorum in Ecclesia merita Patres, non solum . . . grato animo commemoranda, verum etiam, ut par est, praedicanda, commendanda, et laudibus extollenda judicaverunt. Memoria eorum in benedictione erit, quum a piis laboribus quieverint et talenta a Deo accepta, multoque foenora aucta, in Ipsius manus tradiderint. Utinam non deficiat, imo augeatur in dies numerus eorum, qui ad bonum certamen magno animo et corde bono et optimo certandum accinguntur.[86]

Rev. Edward F. Kenrick, Ph.D.

Cardinal Hayes High School
New York, New York

[86] Titulus VII, n. 226, p. 125, quoted in Péries, *L'Index*, p. 211. Here, quite fittingly, it is pleasant to be able to add to our English bibliography the doctoral dissertation of the Rev. Donald H. Wiest, O.F.M.Cap., *The Precensorship of Books*, (Washington, D.C., 1953); pp. 113-126 deal with permission apart from censorship.

Cases and Studies

PROBLEMS IN COMMON-LAW MARRIAGES *

IT is impossible to secure statistics on the number of common-law marriages contracted each year in the United States. It is safe to say, however, that there are many more than we realize. This is true even in those states which prohibit common-law marriages by statute. Though the tendency in the United States is to prohibit such marriages—at the present time, there are only 14 states which do not prohibit them by statute [1]—civil legislation has succeeded only in making such marriages illegal and civilly invalid; it has not succeeded in stopping people from contracting them, invalid though they be in the majority of jurisdictions. In fact, the civil law is in much the same position as the Church on this problem; that is to say, there are all too many marriages invalid "*ratione defectus formae.*"

Koegel, who is one of the ranking authorities on this subject in civil law, shows clearly enough that there is no point

* Address delivered by the Reverend Joseph Green, J.C.D., Defender of the Bond, Diocese of Lansing, April 27, 1955, at the meeting of the Midwest Regional Conference of The Canon Law Society of America held at Detroit, Michigan.

[1] The States which do not prohibit common-law marriages by statute are: Arkansas, Colorado, Georgia, Maine, Massachusetts, Michigan, Mississippi, Montana, New Hampshire, Ohio, South Carolina, Vermont and Wyoming. It is important to note, however, that though some states prohibit common-law marriages by statute, the civil courts of these states continue to recognize these unions as valid marriages; this is true in Alabama, California, Florida, Idaho, Indiana, Iowa, Kansas, Oklahoma, Pennsylvania and Rhode Island. Finally, though Arkansas, Vermont and Wyoming do not prohibit common-law marriages by statute, the courts of these states will not recognize common-law unions as valid marriages.

of civil law concerning domestic relations which is more confusing and upon which one will find more contradictory decisions and statutes than common-law marriages.[2] Therefore, I am not presumptuous enough to think that in the short time permitted me to discuss this question with you that I can clarify it completely. If, as a result of this discussion, you realize that there are many more difficulties connected with the problem of common-law marriages than ordinarily appear at first glance, this discussion will be worthwhile. If, too, the few suggestions regarding the procedure to be followed in handling these cases will be of help to you in your work in the Chancery and Tribunal, the discussion will be profitable.

The following outline is presented in the hope that it will enable you to follow the discussion of this involved problem more easily:

A. *The nature of a common-law marriage.*
   1. What is a common-law marriage?
   2. How can a common-law marriage be contracted?
   3. Who can contract a valid common-law marriage?

B. *Problems arising in Ecclesiastical Tribunals regarding common-law marriages.*
   1. The attempted common-law marriages of baptized Catholics.
   2. The common-law marriages of two unbaptized persons.
   3. The common-law marriages of baptized non-Catholics.
   4. Duplicating marriages.

The entire problem will be clearer to you and easier to follow if you keep in mind that in considering the question of a valid common-law marriage we are concerned only with the

[2] Koegel, Otto E., *Common Law-Marriage and Its Development in the United States* (Washington, 1922), cf. pp. 161, ss.

common-law marriages of non-Catholics, whether they be baptized non-Catholics or unbaptized persons. Catholics are not free to contract a valid common-law marriage, as you know, except in the rarest instances.[3]

A. The Nature of a Common-Law Marriage

1. *What is a common-law marriage?*

A common-law marriage may be defined as "the present agreement between competent parties to take each other for husband and wife."[4] The term is generally understood to signify an informal marriage, that is, one without either a minister or witnesses assisting. However, it also includes those civil marriages which are invalid because of the lack of jurisdiction of the minister, as well as those which are automatically convalidated by the continued cohabitation of the parties after the diriment impediment, which had originally vitiated the consent, has ceased.

Civil law requires *three* conditions to contract a valid common-law marriage. Presuming the freedom of the parties to marry, i.e., no civil diriment impediment being present, these conditions are: First of all, the parties must exchange mutual consent. The manner or form in which they do this is immaterial, so long as it is a mutual exchange of consent. Second, this exchange of consent must contain the intention to contract a *present marriage;* as the authors state, it must be "*per verba de praesenti.*" This is the only form of common-law marriage recognized by American Law.[5] Third, the

[3] Cf. Gasparri, Petrus Card., *De Matrimonio* (2 vols., editio nova, Typis Polyglottis Vaticanis, 1932), II, n. 998; also, Dillon, Robert, *Common Law Marriage*, Catholic University of America Canon Law Studies, No. 153 (Washington, 1942), p. 57.

[4] Long, Joseph, *A Treatise on the Law of Domestic Relations* (3rd. edition, 10th printing, Indianapolis, 1948), p. 90; cf. Schouler, James, *A Treatise on the Law of Marriage, Divorce, Separation and Domestic Relations* (3 vols., 6th. edition, Albany, 1921), II, pp. 1425-1437.

[5] Long, *op. cit.*, p. 91; Koegel, *op. cit.*, pp. 138, ss.

parties must cohabit with each other. On this third condition, civil law contradicts itself. Whereas it admits that "*consensus facit matrimonium,*" in a common-law marriage it demands cohabitation as an essential condition for the validity of the marriage. This contradiction in civil law is based on the difficulty of distinguishing, in a concrete case, what *creates* a common-law marriage and what is necessary to *prove* it.[6] An opinion of the Michigan Supreme Court indicates the practice of almost all jurisdictions when it says:

> It is more or less academic to discuss whether cohabitation is a necessary element of a common-law marriage in Michigan or whether it is one of the necessary proofs of the relationship, because regardless of what theoretically or technically constitutes a common-law relationship, this Court has frequently indicated that it will not find a valid nonceremonial marriage except upon proof of subsequent cohabitation.[7]

Canonically speaking, however, cohabitation is not and cannot be a constitutive element of a common-law marriage. If the parties exchange mutual consent, are not bound by any diriment impediment, they are validly married from the moment they exchange consent. Cohabitation is only a proof of the marriage; it does not constitute it.

To help you in your work in the Tribunals, especially, it would be well for you to impress your priests with the essential conditions constituting a common-law marriage. It is an all too well known fact that priests—as well as lay people—have confused and erroneous ideas on this subject. It is not true that if a man and woman live together for a certain number of years that this relationship automatically becomes a valid common-law marriage with the lapse of time. If they did not exchange consent, the relationship remains concubinage, even though it may have the public appearances of a marriage. Cohabitation alone does not satisfy the civil

[6] Cf. Koegel, *op. cit.*, pp. 116, ss.

[7] Westfall *vs.* J. P. Burroughs & Son, 260 Mich. 638.

courts as to the existence of a valid common-law marriage; always, they have demanded the exchange of consent as well.

More often than not, priests and lay persons make the mistake of thinking that certain relationships are not valid common-law marriages when they actually are. In presenting cases to the Tribunal, nothing is mentioned of the common-law relationship and when it is sometimes discovered in the course of processing the case, both the priests and the parties to the case say: "I didn't think it was a common-law marriage at all." Advise your priests, therefore, when they are handling cases involving non-Catholics—*and particularly baptized non-Catholics*—to be careful in their attempt to spot a common-law marriage. Asking the parties if they have been married is not enough; too often, they think that only a marriage before a judge or minister is meant. Rather, ask them if they have ever lived together with another person as husband or wife. If it is indicated that they have, pursue the questions to determine, if possible, whether or not they have actually given consent to a common-law marriage. This should uncover many common-law marriages which, at present, are not discovered until we are well along in processing the case. And one cannot help but wonder if some of these common-law marriages are never uncovered. This careful investigation is necessary, too, inasmuch as all too frequently too many persons—after they have contracted a common-law marriage and divorced—change their opinion regarding the relationship. They then begin to think that it was not a marriage at all; yet their subsequent change of opinion on the matter does not change the objective facts. As you can see, uncovering a common-law marriage will oftentimes change a Pauline Privilege or a difficult Privilege of the Faith case to a *ligamen* case.

2. *How can a common-law marriage be contracted?*

Briefly, in states where common-law marriages are recognized (and in other states, too, where the courts recognize

them even though the statutes prohibit them) there are three possibilities: First of all, the usual way to contract the marriage is for the parties to take each other for husband and wife by simply exchanging mutual consent to contract a present marriage. A second way in which the common-law marriage can be contracted is rather rare; it is a ceremonial marriage which, technically speaking, is invalid because of a lack of jurisdiction on the part of the judge or minister.[8] A third way in which a common-law marriage can be contracted is the following: Marriages which are invalid originally because of a civil diriment impediment are automatically convalidated, as a common-law marriage, by continued cohabitation once the impediment has ceased. This is true because of the principle of "continuing consent" recognized in civil law.[9] Generally speaking, this principle applies only in those states which recognize common-law marriages as valid, either by statute or by court decisions. However, the judicial practice of each state must be considered on this point because, at times, even those states which prohibit common-law marriages both by statute and court decisions will apply this principle of convalidation by "continuing consent" to common-law marriages.[10] So far as we are concerned, such convalidation applies only to the marriages of the unbaptized; baptized non-Catholics are obliged to renew their consent after the cessation of the diriment impediment, as we shall see.[11]

[8] People *vs.* Girdler, 65 Mich. 68.

[9] Jones *vs.* General Motors, 310 Mich. 605; cf. Koegel, *op. cit.*, pp. 153, ss.

[10] Cf. Koegel, *op. cit.*, pp. 153-160.

[11] Canons 1133-1135. It is important to note that this convalidation by reason of the principle of "continuing consent" applies to the case of unbaptized parties who attempt a common-law marriage in a state where it is prohibited by statute, v.g., in Illinois, and later move to a state where common-law marriages are recognized, v.g. Michigan. Such was the import of the decision of the Michigan Supreme Court in the case of Grammas *vs.* Kettle, 306 Mich. 308.

3. *Who can contract a valid common-law marriage?*

Generally speaking, Catholics are obliged to observe the ordinary canonical form prescribed in canon 1094. As far as the Church is concerned, therefore, they cannot contract a valid common-law marriage. As a rule, Catholics cannot invoke Canon 1098 which decrees the canonical form to be used in extraordinary cases.[12]

Unbaptized persons and baptized non-Catholics can contract a valid common-law marriage. But we must distinguish. First of all, the unbaptized can contract a valid common-law marriage if the civil statutes do not demand a ceremonial marriage. Since ecclesiastical legislation does not bind them, they are bound to observe the civil form, if this form is mandatory under the civil law.[13] Baptized non-Catholics can contract a valid common-law marriage, insofar as we are concerned, even if the state prohibits such marriages. Through baptism, they are bound to observe the laws of the Church unless they are expressly exempt.[14] Though they are exempt from observing the canonical form of marriage, they are not, thereby, obliged to observe any civil form, should the state consider this mandatory for validity. Therefore, even in the states which prohibit common-law marriages, the common-law unions of baptized non-Catholics are valid marriages, canonically speaking, if there are no invalidating ecclesiastical impediments or intentions present to vitiate the consent.

[12] Cf. Gasparri, *op. cit.*, II, n. 998. Practically speaking, it seems that it would be impossible for Catholics to invoke canon 1098 and contract a marriage without the presence of the witnesses required by this canon; it is hard to conceive a case in which witnesses could never be secured.

[13] Cf. Goldsmith, J. W., *The Competence of the Church and State over Marriage—Disputed Points* (Washington, 1944), pp. 48-54; also, Cappello, Felix, *Tractatus de Sacramentis* (5 vols.), Vol. V, *De Matrimonio* (Romae, 1950), nn. 75-81; Gasparri, *op. cit.*, I, nn. 240-256; Ottaviani, A., *Institutiones Iuris Publici Ecclesiastici* (2 vols., Typis Polyglottis Vaticanis, 1947-1948), II, nn. 345, pp. 219-227.

[14] Canons 87, 1099, § 2. (Editor's note: Cf. *AAS*, XL (1948), 305; Bouscaren, *Canon Law Digest*, III, 463.)

B. Problems Arising in Ecclesiastical Tribunals Regarding Common-Law Marriages

1. *The attempted common-law marriages of baptized Catholics*

Inasmuch as the attempted common-law marriages of baptized Catholics—both of the Latin and Oriental Rites—are invalid "*ratione defectus formae,*" a declaration of nullity must be issued on such marriages before the parties could be allowed to contract another marriage in the Church. Since the nullity of this attempted marriage is a public fact, the public judgment of the Church is required to establish the invalidity of the attempted marriage. Also, only through a declaration of nullity can a person's freedom to marry be established when he has attempted a common-law marriage. Since no marriage record can be presented in this case to establish, by documentary evidence, the fact of the attempted marriage, the Tribunal must prepare a special questionnairre to establish this fact. In those states which do not recognize common-law marriage, a civil divorce cannot be secured on such a union; oftentimes, too, a civil declaration of nullity is not granted in this case. Therefore, special questionnaires must be prepared to establish the fact that the parties have definitely separated.

Therefore, the attempted common-law marriages of baptized Catholics are more than sinful relationships; they are invalid marriages—invalid "*ratione defectus formae canonicae.*" A declaration of nullity must be granted on them before the parties could contract another marriage in the Church. This is true even in those states which outlaw common-law marriages. If it is possible, have the parties secure the civil declaration of nullity on this attempted marriage in place of the divorce decree in those states which do not recognize common-law marriages.

The question can be asked: "Do Catholics who attempt a common-law marriage incur any ecclesiastical censures in at-

tempting such a marriage?" Specifically, do they incur the excommunication, inflicted "*latae sententiae*" and reserved to the Ordinary, decreed by canon 2319, § 1, n. 1? The answer to this question must be: "No, they do not incur this censure." This is so because canon 19 demands that those laws which inflict a penalty must be interpreted strictly. Inasmuch as Canon 2319, § 1, n. 1 decrees the censure only for those who attempt marriage before a non-Catholic minister, those who attempt a common-law marriage do not incur it. The same must be said of the censure, reserved to the Ordinary, decreed in some dioceses upon those who attempt marriage before a civil magistrate. In other words, no censure of excommunication is incurred by those who attempt a common-law marriage. Finally, if the parties wish to convalidate their attempted common-law marriage, all the regulations regarding convalidation must be adhered to.[15]

2. *The common-law marriages of two unbaptized persons*

At present, such a marriage is valid in fourteen states of the Union.[16] Though ten other states proscribe common-law marriages by statute, the civil courts of these states recognize them as valid.[17] In the remaining states of the Union, the common-law marriages of two unbaptized persons are invalid. The Church recognizes the invalidity of these unions, admitting that the unbaptized are bound to observe the civil form decreed by statute. These marriages are invalid "*ratione*

[15] Canons 1019-1034 and 1133-1137.

[16] Of these fourteen states, Arkansas, Vermont and Wyoming do not prohibit common-law marriage by statute; however, the civil courts will not recognize common-law unions as valid. An attempt was made to outlaw common-law marriages in Michigan during the 1955 session of the Legislature. However, the bills presented both in the House and Senate were allowed to die in the Committees; hence, common-law marriages are still valid in Michigan.

[17] These states are: Alabama, California, Florida, Idaho, Indiana, Iowa, Kansas, Oklahoma, Pennsylvania and Rhode Island. There are twenty-four states, therefore, that both proscribe common-law marriages by statute and refuse to recognize them by court decisions.

defectus formae civilis" since the state has the right to impose a ceremonial form of marriage for the unbaptized.

Therefore, if the unbaptized parties to a common-law marriage become Catholics, is it necessary for them to renew their consent or to be remarried privately before a priest? We must distinguish. In those states which recognize the validity of common law marriages, such a duplication of the marriage is not required. However, to safeguard the status of their relationship, to protect the legitimacy of their children and their property rights, it would be advisable to have them go through such a ceremony after they have secured the civil license. In those states which do not recognize common-law marriages, it would be necessary for two unbaptized persons who have become Catholics to go through the marriage ceremony after securing the civil license. This is necessary to fulfill the prescriptions of the civil law—which universally in the United States recognizes the canonical form of marriage as a valid civil form—and to establish the validity of their marriage in the eyes of the civil law. It is required, too, to protect their property rights and to legitimatize their children.

If the unbaptized parties are separated and divorced and one of them wishes to become a Catholic and to marry or convalidate an attempted union with a Catholic, the Pauline Privilege would be applicable in those states which recognize the validity of common-law marriages.

In the states which prohibit common-law marriages, if two unbaptized persons secure a divorce from their common-law spouse and wish to marry or convalidate a marriage with a Catholic, would the Pauline Privilege be applicable if they wish to become a Catholic and contract marriage with a Catholic? The question can be asked if it is necessary for them to invoke the Pauline Privilege in this instance. Here is the case: Two unbaptized persons attempt a common-law marriage which is invalid *"ratione defectus formae civilis."* In order to establish the invalidity of their union *"ratione*

defectus formae civilis," we must prove the non-baptism of both of them. Then we must determine that the civil statute renders the marriage *absolutely void* and not *merely voidable.* If these facts are established, strictly speaking, it does not seem that the Pauline Privilege can be invoked for the marriage in question is not a valid marriage. A declaration *" status liber "* could be granted, indicating the invalidity of the marriage because of the civil statute demanding a ceremonial marriage which binds the unbaptized. However, having gone so far as to establish their non-baptism, it would seem to be the more prudent procedure to invoke the Pauline Privilege, *ad cautelam,* if we may use the expression, if the interested non-Catholic wishes to become a Catholic.

If the non-Catholic does not want to become a Catholic, however, and yet desires to contract marriage with a Catholic, if all the essential facts have been established, i.e., that both parties to the attempted common-law marriage are unbaptized, that the civil statute renders the attempted common-law marriage *absolutely void* and not *merely voidable,* then a declaration of *" status liber "* could be issued, permitting him to marry the Catholic with the dispensation from the impediment of disparity of cult.

In those states where common-law marriages are invalid by statute but valid by court decisions, if the Pauline Privilege cannot be invoked for some reason or another, the case would have to be sent to the Holy Office for a decision; this is recommended because of the confusion and contradiction existing in civil statutes and civil procedure regarding the invalidating effect of the civil statute. Or, another recommendation would be to baptize one of the parties and present the case to the Holy Office as a Privilege of the Faith case.

Inasmuch as the unbaptized are bound by the civil diriment impediments, their unions have to be investigated to determine their validity. Time does not permit a consideration of the civil diriment impediments existing in all the states of

the Union. Therefore, we shall briefly consider only the civil diriment impediments which exist in the state of Michigan; for the most part, the civil statutes of other states are not vastly different. At present, in Michigan the civil diriment impediments which render a marriage *absolutely void* are four; that is, *ligamen,* consanguinity, affinity and insanity. Those which render the marriage *voidable* are non-age, force and fraud, impotency. Again, we cannot go into a discussion of the distinction between those impediments which render the marriage *absolutely void* and those which render it *merely voidable.* In each case, in each state, these impediments of the civil law will have to be considered separately and the civil law investigated thoroughly. For the moment, it is sufficient to note that the unbaptized are bound by these civil diriment impediments. Inasmuch as there is much disagreement among civil lawyers and jurists regarding the invalidating effects of the civil diriment impediments, the ecclesiastical tribunal will have to proceed most cautiously. No doubt, the vast majority of cases involving the common-law marriages of two unbaptized persons can be resolved by invoking the Pauline Privilege. As every tribunal knows, however, cases arise from time to time in which this will not be true, it is then that the real intent of the civil law must be determined regarding the civil diriment impediments which render the common-law marriage either *absolutely void* or *merely voidable.*

We must remember, too, that the civil law governing the convalidation of an invalid marriage differs vastly from canon law. Civil law follows the theory of "continuing consent" and if a marriage is invalid because of a civil diriment impediment, once the impediment ceases the continued cohabitation of the parties automatically convalidates the marriage as a common-law marriage.[18] For the unbaptized, therefore, this form of convalidation applies, without any doubt, in those states that recognize common-law marriages as valid,

[18] Cf. Long, *op. cit.*, p. 14.

whether this recognition be on the part of the statutes or court decisions. In those states that prohibit common-law marriage by statute, one would think that such a form of convalidation would not apply. However, the judicial procedure of each state must be investigated because, in many instances, convalidation takes place automatically upon the cessation of the diriment impediment, even though the statutes prohibit common-law marriages.[19]

As a recapitulation, therefore, let us summarize: In those states where common-law marriages are prohibited by statute, the unbaptized cannot contract a valid common-law marriage. The Church, too, recognizes these attempted unions as invalid "*ratione defectus formae civilis.*" In those states where common-law marriages are not outlawed by statute, the unbaptized can contract a valid common-law marriage. The Church recognizes these unions as valid marriages. In those states where common-law marriages are prohibited by statute but are recognized by the civil courts, inasmuch as the courts are the competent interpreters of the civil law, it would seem that the common-law marriages of the unbaptized would have to be considered valid unions, despite the statute to the contrary. In these states, the ecclesiastical tribunals would have to investigate the real intent of the civil statutes to determine if they render the marriage *absolutely void* or *merely voidable.*

3. *The common-law marriages of baptized non-Catholics*

Irrespective of the civil law on the question, common-law marriages in which at least one of the parties is a baptized non-Catholic are valid common-law marriages, presuming there are no ecclesiastical diriment impediments. Though

[19] On this point, it is important to note that we must distinguish between marriages which are *absolutely void* and those which are *merely voidable*; the former can be convalidated only after the diriment impediment ceases, v.g., ligamen; the latter can be convalidated, generally speaking, according to the terms of the statutes once the parties reach the marriageable age (in the case of the impediment of non-age) or *cohabit* after the force or fraud or impotency are detected (in the case of force, fraud or impotency).

such marriages would be considered invalid "*ratione defectus formae civilis*" by the civil law in those states which prohibit common-law marriages, ecclesiastical tribunals must consider them valid marriages. This is true, of course, because baptism places a person under the jurisdiction of the Church. Though baptized non-Catholics are exempt from observing the canonical form of marriage, they are not, thereby, subject to the civil law which may make a ceremonial form of marriage mandatory.

Therefore, in those states which recognize common-law marriages, if the baptized non-Catholics who have contracted a common-law marriage wish to become Catholics, strictly speaking, it is not necessary to duplicate their marriage after their conversion; but it is more advisable to do so for the reasons given above when we discussed this problem in relation to the common-law marriages of the unbaptized. In those states which do not recognize the validity of common-law marriages, such persons, after their conversion, would have to duplicate their marriage in order to comply with the requirements of the civil law and to safeguard their property rights and the legitimacy of their children in the eyes of the civil law.

If the parties to a common-law marriage are baptized non-Catholics and separate and divorce and now wish to marry or convalidate their marriage with a Catholic, we must determine whether only one or both of them are baptized non-Catholics. If they are both baptized, they would be bound by the diriment impediment of *ligamen* in a sacramental union and would not be free to contract another marriage in the Church so long as their common-law spouse lives. The only possibility would be a *ratum et non-consummatum* case and the peculiar circumstances always surrounding a common-law marriage would render this case well nigh impossible of proof. If one of the parties is a baptized non-Catholic and the other is not baptized, all the other conditions being fulfilled, the case could be instituted as a Privilege of the Faith case.

Insofar as we are concerned, the civil diriment impediments do not bind baptized non-Catholics. Because of their baptism, they are bound by the ecclesiastical diriment impediments, with the exception of disparity of cult.[20] What has been said above regarding the convalidation of the common-law marriage after the cessation of a civil diriment impediment, because of the theory of "*continuing consent,*" does not apply to the marriages of baptized non-Catholics. They are bound to renew their consent after the cessation of the diriment impediment.[21] We can see, therefore, how it would be possible that while the civil law would consider a relationship to be a valid marriage, convalidated by continued cohabitation after the cessation of the diriment impediment, v.g., *ligamen,* canonically speaking it would be considered an invalid marriage because the baptized party did not renew consent according to the prescriptions of canon law. Finally, we need not mention that only the ecclesiastical Tribunal is competent to grant declarations of nullity on the invalid common-law marriages of baptized non-Catholics.

4. *Duplicating marriages:*

A question which often arises is this: Should two Catholics, or a Catholic who is bound in a valid mixed marriage, who secure a civil divorce and then become reconciled and resume married life, secure a new civil license and duplicate their marriage before a priest and two witnesses? Canonically speaking, such duplication is never required, for the marriage has never been dissolved. In the eyes of the civil law, however, this is not true. Therefore, in those states which recognize common-law marriages, this duplication of the marriage would not be necessary but it would certainly be more advisable to have them do so. In these states, the parties could renew their consent privately and, thereby, contract a valid

[20] Canon 1070.

[21] Canons 1133-1135.

common-law marriage.[22] In those states which do not recognize common-law marriages, such duplication of the marriage would be required in order to assure the parties that they would, thereby, be safeguarded as to all the civil effects of marriage. Civil law considers that divorce dissolves the marriage, irrespective of what we may think about the question. We are obliged, therefore, to safeguard the faithful as to all the effects of the civil law in this matter.

Conclusions

The following are the more important conclusions to be kept in mind when dealing with common-law marriages:

1. Since common-law marriages are more frequent than is realized, it is important to impress upon priests that they should make a most careful effort to spot and uncover common-law marriages when they are working on marriage cases. Oftentimes, the entire aspect of a case will be changed, because of a common-law marriage, from a Pauline Privilege or Privilege of the Faith case to a rather simple *ligamen* case.

2. Catholics cannot contract a valid common-law marriage, irrespective of what the civil law holds on the question. Such attempted marriages are always invalid "*ratione defectus formae canonicae*" and a declaration of nullity must be issued

[22] Arnold *vs.* Arnold, 225 Mich. 248. In this case, the Catholic parties were reunited after the civil divorce. Knowing the teaching of the Church regarding divorce, they rightly considered that it had no effect on their marital status in the eyes of the Church and God; but they erred in thinking that the divorce had no effect on their marital status before the civil law. After the reunion, they never renewed their marital consent, either privately, as in the case of a common-law marriage, or publicly before a priest and two witnesses. The court held that their subsequent cohabitation did not effect a common-law marriage, despite their religious beliefs on the matter. It held that a renewal of consent to contract a present marriage was necessary to constitute a common-law marriage. As a result of the decision, the widow could not claim her husband's property after his death. The practical result of this decision, as far as the Church in Michigan is concerned, is to have parties who are reunited after a divorce secure a civil license to marry and renew their consent privately, at least, before a priest and two witnesses. Cf. Hannan, Jerome, *Duplicating a Marriage, The Jurist*, VIII (April, 1948), pp. 225-226.

on them before the parties are free to contract another marriage in the Church.

3. In those states where common-law marriages are recognized, the unbaptized and baptized non-Catholics can contract a valid common-law marriage. In those states where common-law marriages are prohibited, only the common-law marriages of the unbaptized are invalid. Irrespective of the civil law on the matter, the common-law marriages of baptized non-Catholics are valid, presuming there are no ecclesiastical diriment impediments. Generally, the common-law marriages of two baptized non-Catholics are ratified and consummated unions.

4. If the parties to a common-law marriage become Catholics, in those states that prohibit a common-law marriage, they must secure a license and renew their consent in order to fulfill the requirements of the civil law. In those states that recognize common-law marriages, the same procedure is advisable even though it is not required.

5. The convalidation of marriage in civil law by reason of the theory of "continuing consent" applies only to the marriages of the unbaptized. Baptized non-Catholics are always obliged to renew their consent after the cessation of the diriment impediment.

6. Unbaptized persons who contract a common-law marriage are bound by the civil diriment impediments. If one or both of the parties to the common-law marriage is a baptized non-Catholic, they are bound by the ecclesiastical diriment impediments.

7. The mutual exchange of consent constitutes the common-law marriage; cohabitation is only a proof of the marriage.

8. If Catholics become reconciled and resume married life after they have secured a civil divorce, in those states that prohibit common-law marriages, they must secure another license and renew their consent before a priest and two witnesses. In those states that recognize a common-law marriage, this duplication of the marriage is not required but it is certainly most advisable.

THE RIGHTS OF THE PAROCHIAL BENEFICIARY IN THE UNITED STATES *

UNDER this academic and seemingly innocuous title are neatly concealed many practical relationships of pastors in our country. As the topic is restricted to the United States, every parochial beneficiary in our beloved land is assured by the Constitution of the said United States of the "right to life, liberty, and the pursuit of happiness" but that is civil law and is no guarantee that his rights will not be disturbed by the bishop, neighboring pastors, assistant and/or assistants, sexton, housekeeper, or Mother Superior! But to define our terms like good Schoolmen.

A right is the legitimate, inviolable, moral faculty or power, of possessing something, doing something, omitting something, demanding something, etc.,[1] or more simply, the object of justice or that which is due, in this case, to the pastor.

A beneficiary is a person, physical or moral, who enjoys a benefice and in Canon 1409 an ecclesiastical benefice is defined as: a juridical entity, constituted or erected perpetually by a competent ecclesiastical authority, consisting of a sacred office and the right to receive the revenues accruing from the endowment of the office. Canon 1410 states that the endowments of a benefice consist in the goods owned by the benefice itself in its juridical capacity, or of certain payments obligatory upon some family or moral person, or of certain voluntary offerings of the faithful, which belong to the rector of a benefice, or so called "stole fees" demanded within the limits of the diocesan statutes or legitimate custom, or the choral

* Address delivered by the Reverend Thomas H. Kay, J.C.D., Vice-Officialis, Diocese of Albany, at the Annual Spring Meeting of the Eastern Regional Conference of the Canon Law Society of America, May 25-26, 1955 at New York City.

[1] Maroto, *Inst. Iur. Can.*, I, p. 17.

distributions to the exclusion of one third part, if all the revenues of a benefice consist in choral distributions. The sources of income mentioned in this canon are disjunctive (either/or) and not conjuctive (and/and). Choral distributions do not pertain to the United States.

Canon 1411 defines the various types of benefices and under it a parochial benefice would be:

a) non-consistorial: since it is not conferred in a consistory;
b) secular generally speaking, except where a parish is connected with a religious institute;
c) double or residential: since the pastor is bound by the law of residence (Canon 465);
d) either removable (temporary) or irremovable (perpetual) (Can. 454);
e) *curatum:* since it entails the care of souls (Canon 464).

The possessor of a parochial benefice is canonically termed a pastor, the *parochus* of Canon 451 § 1, who is a priest, or moral person, to whom a parish is entrusted in title with the care of souls by the Ordinary of the place. Under the term pastor are included (Canon 451 § 2):

a) quasi-pastors,
b) parochial vicars having full powers, viz:
    1. the vicar who administers a parish of which a moral person, such as a religious order, is the habitual pastor (Canon 471),
    2. the *vicarius oeconomus* (administrators of Canons 472-473),
    3. the *vicarius substitutus* of Canon 474,
    4. the *vicarius adjutor* of canon 475.

This discussion is confined to a consideration of the United States, where the general canon law is sometimes accommodated to national conditions. These conditions are to be seen in the growth and traditions of the United States and the Catholic Church in the United States. The history of the

Catholic Church in the United States divides itself into three eras or stages:

I. Prior to 1908—the Mission Years when the growing Church in the growing New World was under the direction of the Congregation for the Propagation of the Faith;

II. The period from 1908-1918—The years when, withdrawn from the control of the Congregation for the Propagation of the Faith, the American Church became subject to the general canon law up to the promulgation of the Code;

III. The present or Code era, 1918 to the present.

The history of the Catholic Church in the United States presents an interesting study. Hours can be spent on it but being canonists and not historians we touch history lightly as we trace canonical root-growths to practical present day conclusions. May we point out that the now fruitful roots of the flourishing American Church of today were planted not by the Spanish and French Missionaries who accompanied the early explorers where the Church was strongly established and well supported but were rather the tenuous plantings from the cut-back growth of the persecuted Catholic Church in England. We must pay tribute to the early English Jesuits coming out at the request of Lord Baltimore who truthfully told them he could offer them no support. With characteristic Jesuit sacrifice and practicality they came over as gentlemen adventurers (not even giving their right names), bringing artisans with them and acquiring lands like the other settlers in the New World from whence they were to draw their support for almost 200 years.[2]

Bishop Carroll wrote in 1709: ". . . the whole charge of their maintenance . . . fell on the priests themselves and no compensation was ever offered for any service performed by them.[3] America was not Europe and the New World boasted

[2] Shea, *The Catholic Church in Colonial Days*, p. 38.

[3] Shea, *op. cit.*, p. 49.

of no benefices except one in the city of New Orleans which is mentioned in an early Provincial Council of Baltimore.[4]

The canonical heritage of the Church in the United States begins with the First Diocesan Synod of Baltimore in 1791 and runs through the meeting of the few American Bishops in 1810, when they exchanged broad "border faculties", down through the seven Provincial Councils of Baltimore,[5] and into the Three Plenary Councils of Baltimore.[6]

These then are our early historical sources along with such Provincial Councils and Diocesan synods as have been held in the United States. The last Provincial Council of Philadelphia was in 1880, the last Provincial Council of New York was the fourth held in 1883; Boston never had a provincial council. Since the last plenary Council of Baltimore in 1884 to the Code in 1918, the only Provincial Council held in the United States is that of the Province of Portland in Oregon in 1932, in which our good friend Monsignor Motry, that tireless searcher of private responses, had a part.—R.I.P.

Our discussion concerns principally Canons 462 and 463. Tracing parochial support in the United States, we find that the First Diocesan Synod of Baltimore, n. 23, ordered that an offertory collection be taken up at Sunday Mass. In 1810 the Bishops shared their territorial jurisdictions. The First Provincial Council of Baltimore in n. 5 accepted the provision of the First Synod that the offerings of the faithful were to be divided in three parts for the support of the pastor, the relief of the poor, and the sustentation of the church. In n. 23 it admonished the faithful to support their pastors. It accepted the Bishops' agreement of 1810.

[4] "Hac autem declaratione nihil innovare volumus quoad illos qui parochialia obtinerent beneficia, quorum unum tantum scilicet in civitate Neo-Aurelia adhuc noscitur in hisce Provinciis . . ."—*II Pl. Balt.*, n. 108.

[5] Viz: 1) 1829—Shea, *History of Catholic Church in the United States*, I, p. 416; 2) 1833—*op. cit.*, p. 433; 3) 1837—*op. cit.*, p. 445; 4) 1840—*op. cit.*, p. 452; 5) 1843—*op. cit.*, p. 460; 6) 1846—*op. cit.*, II, p. 30; 7) 1849—*op. cit.*, II, p. 38.

[6] 1) May 9, 1852—Shea, *op. cit.*, II, p. 367: *CE*, II, p. 235; 2) Oct. 7, 1866—*Acta II Balt.*; 3) Nov. 9, 1884—*Acta III Balt.*

The Second Provincial Council of Baltimore (1833) revoked the reciprocal jurisdictions exercised since 1810. The Third Provincial Council of Baltimore (1837) stated that if many priests were attached to a church only one was to be considered the rector with power to administer the affairs of the church. It advised Bishops to regulate by diocesan statutes the equitable division of the perquisites for baptisms, marriages, masses, etc. Little or nothing pertinent is uncovered in the Fifth (1843), Sixth (1846), or Seventh (1849) Provincial Councils of Baltimore.

The Three Plenary Councils are more important. In the First Plenary Council (decree n. 3) the decrees of the previous seven Provincial Councils of Baltimore were extended to the entire United States. The Council insisted (n. 10) that the quasi-parishes should have well defined limits and the jurisdiction and privileges of pastors should be indicated by the bishop.

The Second Plenary Council of Baltimore confirmed the decrees of the First and under Title III, Chapter IV entitled: *On Priests Having the Care of Souls* legislated:

N. 123. While recalling the common law of the Church for definite parishes and pastors, the council realized that this could not be effected in America at the time, wherefore it declared:

N. 124. Every diocese should define districts like parishes with its church and assign a rector with parochial or quasi-parochial rights.

N. 125. However these rectors were not to consider themselves irremovable. (This meant that the rectors were still delegates of the bishop and so exercised their functions not in their own name. A parish therefore could not be called a parochial benefice.)

Other pertinent points in II Baltimore were:

N. 94. The bishop should settle in a diocesan synod or in consultation with his priests how the alms given on the

occasion of baptism or marriage should be distributed among the priests living together.

N. 221. A priest was not to seek anything for the administration of a sacrament. However, if after baptism or marriage an alms (*eleemosynae*) were freely (*sponte*) given, the priest, if he wished, might accept it. " Hoc enim apud nos consetudo tolerat, neque Ecclesia improbat. (Cf. Rom. Rit. sub init.)"

In conferences held at Rome in 1883 (before III Baltimore was convened) between the Cardinals of the Congregation of the Propagation of the Faith and the American prelates the Cardinals proposed to establish in the United States canonically erected parishes and pastors. The American prelates thought it inopportune and the compromise was worded thus:

Utrum in America debeant constitui veri parochi in sensu canonico vel tantum rectores inamovibiles sicut in Anglia cum sola dote inamovibilitatis et absque juribus ac privilegiis verorum parochorum? Emi dixerunt propositam questionem esse definiendam ita: Pro nunc esse constituendos rectores inamovibiles sicut in Anglia." [7]

The Third Plenary Council of Baltimore (1884) repeats II Baltimore, nn. 123, 124, 125, and established irremovable rectors (n. 33) according to the English fashion in places having sufficient revenues for the support of priest, school, and church. In n. 281 it is stated that if a priest did not take his salary within a year from the time it was due, he was considered as renouncing his right.

When in 1908 the United States was withdrawn from the direction of the Congr. P. F., and the common law prevailed, the existing legislation about pastors was not changed.[8] Even when the Code was promulgated in 1918 it was still questioned whether or not the parishes in the United States were canonically erected parishes and the rectors thereof were true canonical pastors and possessors of parochial benefices. A

[7] Smith, *Elements of Eccl. Law*, I, p. 411, note.

[8] Cf. S. C. Consist, June 28, 1915, in re: Pius X, *Maxima Cura* of Aug. 20, 1910.

letter of Archbishop Bonzano, then Apostolic Delegate to the United States, written Nov. 10, 1922, made it clear that the Code did actually set up the pastors of the United States as true pastors and their parishes were truly ecclesiastical benefices. This, he stated was clear from a response he had received from Cardinal Gasparri, President of the Commission for the Authentic Interpretation of the Code, that a parish is always considered a benefice according to Canon 1411, 5°, whether it has the proper endowment (resources or revenue) as described in canon 1410 or even, if lacking endowments, it is erected according to the provisions of Canon 1415, § 3.[9]

With this historical background we come to the canonical interpretation of our subject certain that the American Pastor is the possessor of an ecclesiastical benefice.

The rights of the parochial beneficiary in the United States include the right of the pastor to perform certain functions reserved to him by the general law of the Code (Canon 462) and the right to receive the offerings given on the occasion of these ministrations. These offerings are commonly known as stole fees; white stole fees at baptisms and marriages, black stole fees at burials. The Old World idea of a benefice as an endowment and the appointment of a priest to receive a living from the returns of the properties of the benefice is far different from the American conception and reality. With us the pastor of a parish must raise the money for the parish and in return he receives part of this in a definite salary determined by the Ordinary, and also receives uncertain stole fees, as mentioned in Canon 463, the disposition of which is variously determined in the different dioceses. In the United States the pastor cannot sit back and receive a living from the parochial benefice. He must work to keep the parish going and "root hog" to make his living.

The right of the parochial beneficiary in the United States is based on the pastor's possession of the parish in title and the

[9] Apostolic Delegation, No. 3096-F; cf. Augustine, *Canonical and Civil Status of Parishes*, p. 63; Coady, *The Appointment of Pastors*, p. 67; also, S. C. Con., Aug. 1, 1919, *AAS*, XI (1919), 364.

possession of ordinary jurisdiction or power or authority in that parish which he holds as a benefice. The pastor's rights are detailed in the functions reserved to him in relation to his parochial territory and persons within that territory (Can. 462), and the right to the revenues accruing to him by reason of approved custom and legitimate taxation as established by a Provincial Council or meeting of the bishops of the province and approved by the Holy See.

Functions can be sacerdotal or parochial. The former may be performed by any priest by reason of his ordination; the latter are reserved by law to the pastor in Canon 462 and related canons throughout the Code. The reservation of parochial functions of Canon 462 are taxatively enumerated.

Canon 462: The functions reserved to the pastor, unless otherwise stated in the law, are:

1° to baptise solemnly;

2° to carry the Blessed Eucharist publicly to the sick within his own parish;

3° to carry the Blessed Eucharist, publicly or privately, as Viaticum to the sick and to administer Extreme Unction excepting those withdrawn by law from his authority;

4° to announce the banns of ordination and matrimony; to assist at marriages; to impart the nuptial blessing;

5° to perform funeral services according to the prescriptions of canon 1216;

6° to bless homes on Holy Saturday or any other day according to local custom;

7° to bless the baptismal font on Holy Saturday, to conduct public processions outside the church, to impart with pomp and solemnity blessings outside the church, unless there is question of the cathedral chapter which may perform these functions.

To examine these reserved functions in detail:

1° to confer solemn baptism: The pastor of the parish has the right to baptise solemnly in his own parish all persons except those having a domicile or quasi-domicile in another parish and who can be brought to their own proper parish

easily and without delay (Can. 738, § 1). An infant has the residence of the one in whose care he is, generally the father (Can. 93, § 1). Wherefore the pastor has the right to solemnly baptise:

1. his own subjects, i.e. those having a domicile or quasi-domicile in the parish limits;
2. *vagi;*
3. *peregrini,* if these cannot be brought to their proper parish easily and without delay.

The pastor can baptise solemnly in any church within his parish limits (Can. 775). He cannot baptise solemnly even his own subjects outside his parish limits, except, of course, with the necessary permissions (Can. 739). In peculiar circumstances we note that:

1. Any priest may baptise anywhere in danger of death (Can. 741, 759);
2. Private baptism may be administered by any priest anywhere (Can. 742);
3. The baptism of adults should be referred to the Ordinary (Canon 744), but generally in the U.S. diocesan faculties delegate this to the priests, and in the case of converts diocesan faculties generally allow the priest who gave the instructions to receive the convert by baptism. May we note this? Some diocesan statutes say " without regard for the domicile or quasi-domicile of the convert " (Boston, n. 95). It may be suggested that diocesan domicile be the qualification, for even a bishop should not overreach diocesan lines.
4. Conditional baptism, privately conferred, is not reserved to the pastor.[10]
5. A pastor baptises solemnly only in his own rite. If a child's father is of an Eastern Rite, the child should be baptised in that rite unless there is a special law to the contrary.[11]

[10] Cappello, *Summa,* II, n. 508, n. 8.

[11] Can. 756; Duskie, *Orientals in the U. S.*; Boston Synod, n. 102; Pospishil, *Interritual Canon Law Problems,* p. 69.

6. Respecting the supplying of the ceremonies, there is no agreement among the authorities. Since this partakes somewhat of the nature of solemn baptism, one is inclined to reserve this to the pastor.[12]

2° To the pastor is reserved the right to bear the Eucharist publicly to the sick within the confines of his parish. Since in the U. S. it is customary to bear the Eucharist privately rather than publicly (Can. 847), we need not worry about this reservation. May we note though that Bishop Eustace of Camden, N. J. has this in the diocesan pagella n. 8: "*Deferendi privatim Sacram Communionem ad infirmos, iusta et rationabili de causa*"—a canonical acknowledgment of the custom. When the priest carries the Eucharist from a church to which he is attached, he has no need to consult the local pastor. Where the priest obtains the Sacrament from the local church, he needs the permission, expressed or presumed, of the priest having the custody of the Eucharist (Can. 849, § 1).

The First Communion of children belongs for decision to the parents and confessor. The pastor should be informed that he may note the fact in the parochial register (Boston, n. 126). General law does not require a First Communion Record but custom and diocesan statute (Boston, n. 126) do. Such a record is implied in the prenuptial questionnaire query as to the date and place of First Communion.

The Easter duty precept may be fulfilled in any church yet the pastor should be informed of its fulfillment (Can. 859, § 3).

3° To bear the Eucharist as Viaticum and to administer Extreme Unction to those in danger of death with due respect to Canon 397, n. 3, concerning the bishop; Canon 514, a religious house; Canon 1368, the seminary; Canons 848, § 2 and 938 § 2 dealing with cases of necessity.

Viaticum may be interpreted as the reception of the Eucharist prescribed by ecclesiastical law in danger of death

[12] Fanfani, *De Iure Par.*, n. 285.

(Can. 864, § 1). Only this ministration is reserved to the pastor. When the Eucharist is given as "Viaticum" in the broad sense, i.e., without observing the Eucharistic fast it may be administered by any priest before or after the Viaticum strictly so called has been given by the pastor.[13]

Extreme Unction is administered by the pastor within his limits unless some place has been exempted by law as already seen or the bishop has established a chaplain at a hospital as is customary in many sections.

The Last Blessing (Can. 468, § 2) is not reserved.

4° To announce the banns of sacred ordination except for religious with perpetual vows (Can. 998) and to announce the banns of marriage (Can. 1022). This latter belongs to the proper pastors of the parties. No fee should be sought for this as is sometimes asked in certain parishes.

The assistance at marriage within the parish follows the well known and often discussed norms for validity (Can. 1095) and liceity (Can. 1097). This is generally observed by U. S. pastors. The pastor can delegate this right. Curates upon appointment or in the diocesan faculties are usually delegated by the Ordinary to assist at marriages within the parish during their tenure. Needless to say, they should consult the pastor when they assist at a marriage in the parish.

To impart the nuptial blessing is reserved to the pastor or the one properly delegated (Can. 1101, § 2).

5° To conduct funeral services according to the norm of Canon 1216.

1. Ordinarily it belongs to the proper pastor of the deceased to conduct the obsequies in the proper parish of the deceased (Can. 1216, 1230). This includes prayers at the wake, leading the funeral to the church, the funeral Mass, accompanying the body to the cemetery, and the committal services.

[13] Ver. Creus, *Epitome, I. C.*, II, n. 114; Fanfani, *De Iure Par.*, n. 269; Aertnys-Damen, *Theol. Mor.*, II, n. 125.

2. If the deceased had many proper parishes, the funeral should be in the parish in which he died.
3. When the deceased died outside his proper parish, if convenient, the remains should be brought to his own proper parish church; otherwise the church and pastor for burial is the one of the place where he died (Can. 1212, 1230, § 2).
4. All persons, except religious and those who have not reached the age of puberty, can select the church for their funeral (Can. 1223, 1224).
5. Whenever the funeral takes place outside the deceased's own parish, the proper pastor of the deceased is entitled to his parochial portion (*quarta funeralium*) unless the body could not conveniently be brought to the proper church (Can. 1236). Privileges and customs to the contrary are, however, permitted.[14] In the United States this parochial portion is not observed and diocesan statutes are silent on the matter. It is better so.[15]

6° Blessing of homes. The Holy Saturday rite is not generally observed in the United States except among those who have come from Catholic countries overseas. It is only this blessing (*Rit. Rom.* Tit. 8, cap. 4) which is reserved to the pastor. Any priest may bless a home anywhere.

7° Blessing of the baptismal font on Holy Saturday. This reservation the pastor generally is happy to delegate to the assistant. The blessing prescribed in the liturgy for the vigil of Pentecost holds according to the S.C.Con., reply of June 10, 1922.[16] We can consider this as equally reserved to the pastor though the Code does not mention it, yet the reply intimates it. More often this blessing on the Vigil of Pentecost is overlooked by the pastor when he looks over the amount of Chrism and Oil of Catechumens dealt him on Holy Thursday as his parochial portion!

[14] Cappello, *Summa*, II, 740-758; Ferry, *Stole Fees*, p. 89; Bouscaren, *Canon Law Digest*, I, pp. 569-582.

[15] Beste, *Int. in Cod.*, p. 603; Bouscaren-Ellis, *Canon Law*, p. 622.

[16] *AAS*, XV (1922), 225.

To lead public processions prescribed by law or custom outside the church (Can. 1290, § 1). Any other type of procession needs the approval of the Ordinary. Pastors of national parishes and pastors in the vicinity of such parishes are acquainted with religious processions in honor of the various saints. The May Procession and Crowning of the Virgin is a familiar scene in the American parish.

Moreover the pastor may impart blessings outside the church with pomp and ceremony unless it is a question of the Cathedral Chapter. These would include the blessings of buildings, bridges, etc., within the parish limits.

The blessings for churching, candles, ashes, and palms are not reserved to the pastor.

From these reserved parochial functions listed taxatively in Canon 462 accrue benefits called stole fees which are treated in Canon 463. These are mostly concerned with the hatching, matching, and dispatching of the parishioners!

Canon 463: The pastor has the right to the revenue to which ligitimate custom or legal taxation according to Canon 1507, § 1 entitle him. If he exacts more, he is held to restitution. If any of the parochial ministrations are performed by another priest, the fees or offerings belong to the pastor unless the contrary will of those making the offering is certain concerning the sum over and above the usual tax. The pastor shall not refuse his ministrations gratuitously to the poor.

The "*praestationes*" of Canon 463 extend to any offering (except Mass stipends) established by reason of custom or legitimate taxation as set by a provincial council, or a meeting of the bishops of the province, to be given on the occasion of the administration of the Sacraments or Sacramentals throughout the province. The approbation of the Holy See is needed for this definitive taxation (Canon 1507, § 1). In the United States the offerings are ruled by custom. In only one province, that of Portland in Oregon, is there a provincial schedule. We shall see this later.

The monetary rights of the parochial beneficiary in the United States include the set salary as determined by the Ordinary for the diocese. The pastor's salary as well as that of the assistants is established as III Balt. n. 273 suggested by diocesan statute [17] or episcopal decree and is collectible when due. The pastor who does not collect his salary within a year from the date due is considered as having yielded it to the parish. This provision of III Balt. n. 281 is repeated in some synods.[18] If a parish is unable to meet the salary obligation, the bishop is to make other arrangements (Boston, n. 204), though some diocesan statutes declare that the pastor (ironically the parochial beneficiary) should be willing to receive less than the stated salary.[19]

Regarding stole fees, custom remains the determining factor and on three scores, viz:

1. whether or not the pastor is entitled to an offering;
2. at what functions offerings are to be made;
3. the amount of the offering.

1. In general custom has established that an offering be made to the pastor at some of the parochial functions of Canon 462, especially at baptisms, marriages, some blessings, and funerals. Does this offering belong to the pastor personally? There is a lack of uniformity throughout the Church in the pastor's dominial rights over the stole fees. We can distinguish three cases.

a) In a one man parish it could be said that the offering belongs to the pastor personally. Boston (n. 202, 4) says stole fees in any parish belong to the pastor.

b) Where assistants are associated with the pastor, the offerings in some diocese are divided among them in the manner prescribed by III Balt. n. 94, which is only repeating the First Plenary Council of Baltimore, n. 51.[20]

[17] N. Y. Synod 17th, n. 43, 1; Boston, 7th, n. 205; Phil. 9th, XI, c.

[18] NY, n. 44; Boston, n. 205; Phil., XI, c.

[19] Phil., XI, b; Portland in Or., Prov. Con., IV, in Appendix.

[20] N.Y., IV, Prov. Con. c. XVI, n. IX, p. 79; Phil. Synod, IX, n. XII, b.

c) More recently these offerings are marked by local legislation for the support of the parish house, and the pastor is merely the custodian and administrator of them. This disposition defined by diocesan statute denies to the pastor true *dominium* over them.[21]

What if there is a surplus in the stole fee income? This is a purely academic question in these days. What of Canon 1473, directing that the superfluities of a benefice go to the poor or a pious cause? Although Canon 1410 mentions stole fees, these are not to be generally considered fruits of the benefice unless the decree of erection definitely determines them as such.[22] It is doubtful if they constitute the fruits of a benefice. Aertnys-Damen [23] say the question can hardly be settled without a decision from the Holy See. Vermeersch [24] and Cocchi (n. 82) agree. Yet Boston Synod (n. 63) speaks of "*bona superflua*" as if they came under Canon 1473.

2. At what functions are offerings to be made? Only at the parochial functions of Canon 462 with the addition of such other functions to which custom has attached an offering such as perhaps, churching. Boston (n. 83) says: "if a long standing custom has existed of attaching a stipend to some other service, permission may be sought from the Ordinary for the continuance of this custom."

3. Custom also determines the amount of the offering. This can vary. Diocesan statutes usually set no definite amount [25] though the Prov. Council of Portland in Oregon has done so (nn. 209, 210).

May a pastor pass up his right to receive a stole fee? No. The right is not a personal one but belongs to pastors as a class. An individual has no right to prejudice the rights of

[21] NY Synod, n. 43, § 2.

[22] Ferry, *Stole Fees*, p. 40.

[23] *Op. cit.*, I, 662, IV.

[24] *Theol. Mor.*, II, n. 379; *Epitome*, II, n. 798.

[25] Cf. NY, n. 74; Boston, n. 82.

pastors in general.[26] What if the faithful make no offering? While the pastor has a right to the stole fee, he cannot enforce that right. He may appeal to the Ordinary who has the power and obligation to safeguard these rights (Canon 2349). Prudence and tact are demanded of the pastor if he brings this matter to the bishop's attention, and the Ordinary too will need prudence in acting upon the complaint.

What of legitimate taxation? The Church has a right to levy a tax (Canon 1496). Canon 463 states that this must be decided in a provincial council or meeting of the bishops of the province and approved by the Holy See.[27] III Baltimore sets no definite schedule, and since the Code the only provincial council is that of Portland in Oregon held in 1932, approved by the S.C. Council Feb. 16, 1934 and effective August 15, 1934. In it we read:

Decree n. 209: Mass stipends for funeral fees:

> Solemn Mass offering $25.00—distributed: alms $15.00, stole fee $8.00, deposition $2.00.

Decree n. 210: Marriage fee:

> Missa cantata $15.00—alms $5.00, stole fee $8.00, church $2.00.

Baptism—stole fee $1.00.

There is a provision that the faithful take care of the expenses for singing.

If we consider the sacraments in detail, we can note the more recent enactments of the various diocesan synods in the United States.

Baptism. The Code makes no mention of a baptismal offering outside the general reference in Canon 463, § 1. Synods do refer to it. The general tenor of their enactments is that the priest cannot demand an offering beforehand nor refuse his ministrations. He may after the ministration accept an offer-

[26] Ferry, *Stole Fees*, p. 50.

[27] Canon 1507; cf. S. C. C., Dec. 11, 1920—*AAS*, XIII (1921) 350 sq.

ing freely given. The amount of the donation is not stated.[28]

The Eucharist. Usually there is no question of an offering here. Yet on sick calls the faithful may seek to make an offering for a Mass or for the transportation. Boston (n. 84) has this: On the occasion of a sick call no priest shall seek or accept any offering or gift, even in the form of a Mass stipend.[29]

Confession. Here there is never any question of an offering. Boston (n. 134) warns against taking Mass stipends. Some older priests may recall slots in confessionals through which Mass stipends were once passed. The IX Synod of Philadelphia (n. XXXII) has detailed legislation respecting the issuance of tickets for, or certification of, confession. I recall having heard of a priest making the circuit of foreign born for confessions having a basket outside the confessional for those approaching for their Easter Duty confession.

No offering is generally made at Extreme Unction although people may seek to give a transportation offering or Mass stipend.[30]

Marriage. For the publication of the banns there is no offering customary. Here again I have heard of some pastors asking a fee for the publication of the banns of marriage. The Code in Canon 1097, § 3 takes cognizance of offerings being made at marriages. The pastor who without due license assists at a marriage is not to keep the stole fee but is to remit it to the proper pastor, generally the pastor of the bride. If she has several proper pastors the fee is to be divided. Wernz-Vidal[31] say this includes even the pastor of the month's residence.

Burials Here the general law is that the fee is not fixed by a provincial council but by the bishop with the advice of his consultors (Canon 1234, § 1). This schedule does not need the approbation of the Holy See. The Prov. Council of Port-

[28] NY, n. 74; Boston, nn. 81-82-83.

[29] Cf. N. Y., n. 74, § 2.

[30] Cf. Boston, n. 84.

[31] *Ius Can.*, V, n. 542, note 58.

land in Oregon was usurping a diocesan matter in fixing funeral fees (decree n. 209). The New York synod says no offering is to be asked for going to the cemetery (n. 159, § 3); the Boston Synod has nothing, but Philadelphia details funeral fees in n. XLVII, p. 31.

Who demands more than custom or taxation grants is held to restore that part over and above the usual offering. The transgressor does not incur the penalty against simony,[32] for the offering is on the occasion of a spiritual ministration and not in payment for a spiritual thing (Can. 730). Such a one, however, does render himself liable to the penalty of Canon 2408, which prescribes a fine for those guilty of this crime and, if they offend again, suspension or removal from office besides the obligation of making restitution of the money unlawfully received (Can. 463, § 2).

When an assistant or extern performs the parochial function, the fee (Mass stipend excepted) goes to the pastor of the parish. Any excess above the usual offering may be retained if it is certain that the donor intended it to go to the one performing the service.

The direction of the Code in Canon 463, § 4, that the pastor shall not deny his services to those unable to make an offering is expanded in Boston n. 81.

The Synod of Boston (n. 58) states: No fee shall be exacted for baptismal, confirmation, marriage, or other similar records. A distinction should be made. If these are for ecclesiastical purposes, there should be no fee. If these are sought for other purposes, as securing a driver's license, social security, passports, insurance benefits (or by a child to prove her age and right to reduced admission price to the local movie!) a fee should be set for such service in the diocesan statutes. In this age of documents much time is consumed in old established parishes tracing records.

The study of stole fees or offerings made upon the occasion of the administration of the Sacraments or Sacramentals

[32] Fanfani, *De Iur. Par.*, n. 240.

shows that the gift was not for the Sacrament itself (this would be simony), nor for the labor involved but came as a gradual evolution in recognition of the constant care of the pastor in tending to the spiritual and often temporal well-being of his flock and as a contribution to his support. The custom grew during times in which parish populations were more stable than today when American people are in a constant state of motion and the country is literally on wheels or "in the air". Old parish stability and loyalties are passing. How true the lament of "The Weary and Tired Pastor" in the Priest, November 1955, page 956: "I am beginning to think that parish life is a thing of the past." Pastors know that the only strong parochial tie which remains is the parish school. Catholic maternity hospitals have their baptismal fonts. Hospitals, Catholic and secular, have their special Catholic chaplains to care for the sick and the dying and administer the last rites. The pastor of today is not looked to as formerly for the great events as life begins and ends but only (and not even then at times) for the nuptials of those who often go immediately to live somewhat beyond the parish limits. And the clergy, both pastor and assistants, are changed more frequently now in the interest of diocesan welfare and organization. The underlying idea of stole fees as an expression of the enduring bond between the pastor and those in his care is rapidly passing or has already passed.

As a practical suggestion, all stole fees should go into the church treasury. Let the parish house be maintained from parish funds. Give all priests, pastors and assistants, an adequate and fixed salary. With the stole fees no longer considered a "right of the parochial beneficiary" matters would be equalized for town and country, large and small parishes. Then neighboring brethren would not refer to them as "stolen" fees. *Ecce quam bonum et quam jucundum habitare fratres in unum!*

Decrees and Decisions

SECULAR

PRIVILEGED SLANDER

The Minnesota Supreme Court has recently applied the universal rule that defamatory statements made in a judicial proceeding by a party or his attorney are absolutely privileged, if relevant, to affirm the dismissal of a slander action against an attorney who termed a woman an "adulteress" during a hearing in which he was both a party, as guardian, and attorney for himself.

The woman to whom the remark was applied claimed she was the wife of the man who was the ward of the attorney, and as such entitled to support money from the ward's estate as his lawful wife. The attorney-guardian claimed that the ward had another wife from whom he was not divorced. The Court considered the remark absolutely privileged since it was relevant to the proceeding. It went on to say that relevancy need not be legal relevancy. The true test is whether the defamatory matter has some relation to the subject matter of the judicial proceeding, and in the present case the remark of the attorney had some relation since the supposed wife's claim would necessarily be based on a husband-wife relationship.

* * * * *

LIABILITY FOR "TRAP"

The Court of Appeals of New York has held the owner and user of real estate liable for the death of a twelve year old boy who fell down a flimsily-covered shaft maintained on the premises. The shaft, which was fifty-five feet deep, had a four-by-four opening which was usually covered by metal trap doors. At the time the boy fell, however, only one door was in use. The other side of the opening was covered by boards put together in an arrangement described as "jerry-built" and "flimsy." The building was in a congested neighborhood and children often played in the vicinity. While the boy was a trespasser, or at best a bare licensee, the Court

declared that the defendants had created a " deceptive trap for the unwary " and had done so by positive action rather than by allowing a defective condition to arise. The wooden platform was not merely insecure, but " gave a deceptive appearance of safety, was pregnant with hazard and the direct consequences were clearly foreseeable." Two judges dissented on the theory that no violation of a duty owed to a trespasser had been shown.

* * * * *

SEGREGATION

The Court of Appeals for the Fourth Circuit has held that the doctrine of desegregation announced by the Supreme Court of the United States in the *School Segregation* cases extends beyond the field of public education and requires unsegregated public recreational facilities, reversing the decision of the U. S. District Court for the District of Maryland and the trend of other Southern decisions, that the Supreme Court's decision was peculiarly applicable only to public education.

The combined effect of the *School Segregation* cases, and *McLaurin v. Oklahoma State Regents*, and *Henderson v. U.S.*, in which the Supreme Court banned racial segregation in state institutions of higher learning and interstate railway dining cars is to destroy the basis of the doctrine of *Plessy v. Ferguson*, that segregation is not unconstitutional when " separate but equal " facilities are furnished the Negro race. " Segregation," said the Court, " cannot be justified as a means to preserve the public peace merely because the tangible facilities furnished to one race are equal to those furnished to the other." It further went on to say, " The Supreme Court expressed the opinion that [it] could not turn back the clock to 1896 when *Plessy v. Ferguson* was written. . . . With this in mind, it is obvious that racial segregation in recreational facilities can no longer be sustained as a proper exercise to the police power of the State; for if that power cannot be invoked to sustain racial segregation in the schools, where attendance is compulsory and racial friction may be apprehended from the enforced commingling of the races, it cannot be sustained with respect to public beach and bathhouse facilities, the use of which is entirely optional."

* * * * *

IMMUNITY STATUTE

The immunity statute [18 U.S.C.A. § 3486] passed last year, which provides that in congressional investigations and judicial proceedings involving national defense or security a witness who has claimed his constitutional privilege against self-incrimination may be compelled to testify and produce documents in return for immunity from future prosecution " in any court " as to any matter concerning which his testimony is compelled, has been unheld in the U.S. District Court for the Southern District of New York.

The case arose from a grand jury investigation of espionage and conspiracy to commit espionage. The witness claimed Fifth-Amendment privileges, and the U.S. Attorney, with the approval of the Attorney General, applied to the court for an order directing the witness to answer. The witness contended that the immunity granted was not coextensive with and was not a full and complete substitute for the privilege taken, because it left him subject to state prosecution for state crimes. He also contended that the statute was unconstitutional because it devolved on the judiciary a non-judicial duty, viz. to grant immunity.

The Court, noting that immunity statutes have a long history, refused to re-examine or overturn the line of cases which have held that Congress has power to enact immunity statutes, calling this power a " principle firmly imbedded in our constitutional law." It also said that " Congress has the constitutional power, certainly with respect to matters touching upon the national defense or security, to provide for a grant of immunity in exchange for compelled testimony which is broad enough to prohibit state prosecutions." In other words, the Court treated the field of national defense and security legislation as one preempted by the Federal Government. The language of the statute would preclude both state use of the testimony in a state prosecution and state prosecution itself with regard to matters disclosed by the compelled testimony. The Court further found that there was no improper delegation of a non-judicial function to the judiciary, since the Court would have no discretion as to whether an order should issue, so long as it found the judicial proceeding related to matters of national defense or security, that the U.S. Attorney certified the testimony was necessary in the public interest, that the Attorney General approved, and that no other legal objection existed to compulsion of the testimony.

* * * * *

INSANE ACCUSED

The Court of Appeals for the Eighth Circuit differs with the Courts of Appeals for the Ninth and Tenth Circuits in holding that the United States may constitutionally hold indefinitely for trial an accused person who appears to be permanently insane. The statute enacted in 1948 as 18 U.S.C.A. §§ 4244-4248 provides that after a determination that a person charged with a federal crime and in the custody of the United States is insane or mentally incompetent to stand trial, he shall be committed to the care of the Attorney General " until the insanity or mental competence of the person shall be restored."

Were the insanity temporary so that he would be able to stand trial without unreasonable delay there would have been little argument, but where it appeared that he might be held permanently it was argued that the statute violated due process by allowing continued incarceration without trial, and violated the Tenth Amendment by taking from the States their duty and responsibility in connection with insane persons.

With one dissent, the Court ruled that the validity of the legislation did not depend on the probable duration of an accused's mental incompetency and that it was constitutionally unobjectionable. The powers granted by the statute were but necessary incidents to the Federal Government's power to provide for the enforcement of its own criminal laws.

* * * * *

RESTRAINT ON MARRIAGE

The Supreme Judicial Court of Massachusetts has held that a provision of a will revoking gifts to any of the testator's children who " shall marry a person not born in the Hebrew faith " is not too vague and is not an invalid restraint on either marriage or freedom of religion. The Court therefore approved the revocation of any interest of a son in income and principal of a testamentary trust after the date of the son's marriage to a Roman Catholic. The son attempted to show that he had not violated the provision because his wife had taken religious instruction in Judaism and had in fact become a convert. Since the actual conversion of the wife did not occur until after the civil marriage ceremony the Court found she was not " a person born in the Hebrew faith " at the time of the marriage.

The Court rejected the English view that the words "Jewish faith" and "Hebrew faith" are void for uncertainty. It followed the quite general American rule upholding testators' impositions of conditions requiring or prohibiting education in or marriage within a certain faith. The Court said that it can be definitely determined whether a person is "born in the Hebrew faith" particularly since prima facie a person takes the religion of his parents. It also rejected the contention that the provision violated the constitutional guarantee of religious freedom and was an unreasonable restraint on marriage. The Court said that an inducement by way of gift to adopt or adhere to a particular religious belief is not a denial of religious freedom, for the beneficiary can always reject the gift. The restraint was only partial and partial restraints on marriage are valid unless unreasonable, and, said the Court, the present restraint was not unreasonable.

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HUSBAND'S THEFT FROM WIFE

For the first time the New York Court of Appeals has answered an old question, whether a husband can "steal" from his wife. The husband argued that at common law there could be no theft by a husband of his wife's property. Further, the Married Women's Acts said nothing about larceny, so the criminal law remained unchanged, i.e. the early larceny statute did not cover misappropriation of a wife's property by her husband. The Court held that the larceny laws were inapplicable prior to the Married Women's Act only because the wife's chattels did not belong to "another" but to the husband himself. When the wife became "another," the larceny statutes covered her losses. The Court went on to say that it relied upon the good sense and careful judgment of prosecutors, police, judges, and juries not to turn into larcenies petty disagreements over personal property.

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EMPLOYER'S LIABILITY

The New York Court of Appeals has refused to give an employer the benefit of the hospital exemption rule, even though it has been applied to private corporations which engage physicians for treatment of employees or third persons, when employers utilize the services of doctors to examine prospective employees. In the hospital there is a doctor-patient relationship. The doctor determines what

is to be done, and the negligence, if any, occurs in the course of treatment. In the present case, the plaintiff merely sought employment. He was not the doctor's patient. He asked for and received no treatment. So the doctor's negligence in the case (taking a blood sample) comes back upon the employer.

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OPERATION ON CHILD

The New York Supreme Court, Appellate Division, has ordered a child to submit to surgery despite parental opposition. The child had a congenital harelip and cleft palate. The lip could be repaired and subsequent surgery could close part of the palate, without substantial risk. It was necessary for the treatment to be given as soon as possible because results become less favorable as the patient advances in age.

The father preferred to rely on " forces of the universe " which would help the child to cure himself. The Court, however, interpreted the Children's Court Act as allowing it to order medical treatment over the parents' opposition, not merely allowing it to order county aid where parents are financially incapable to providing medical care. The Court also considered the State's very great interest in the physical and mental health of its inhabitants and felt that the child was both neglected and physically handicapped. He was neglected because the father refused to furnish him with medical care which was needed. He was physically handicapped because he was partially incapacitated for education and remunerative occupation, even though his physical life was not in danger.

Two judges dissented, giving weight to the honest and sincere opposition of the father, in which the child joined. They also agreed with the trial court's conclusion that more harm than good might come from arbitrarily forcing the child to undergo surgery.

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COMPANY DOMINATION

The Court of Appeals for the Sixth Circuit has held that an employer's sponsorship of a grievance committee for his unorganized workers does not violate Section 8(a)(2) of the Taft Act, although it includes organizations processing " grievances " in its definition of the " labor organizations " an employer is forbidden to dominate or finance. The opinion does not explain why it would be inconsistent

for Congress to permit the processing of grievances through non-union machinery or organizations and at the same time prohibit employers from dominating such machinery or organizations.

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ANCIENT ART PRINTS OBSCENE

The Federal District Court for Maryland has ordered confiscation under the Tariff Act of prints depicting ancient statues and other artifacts decorated with erotic activities, features, or symbols, accompanied by a text in German, because they "would be regarded as obscene by a majority of normal men and women in the United States today." The claimant contended the portfolio was a scientific or scholarly work in the field of archeology. The Court, however, doubted whether the *Parmelee* case, creating an exception for such works, should be applied to the instant case since Vinson, dissenting, had noted that in 1930 Congress added a proviso indicating that it did not regard the so-called classics or books of recognized literary or scientific merit as ipso facto outside the prohibition against importing obscene books. The Court went on to say that while a vase depicting an erotic scene may be included in a group on exhibition in a museum, it did not believe the present "taste and morals" of the community would approve the public exhibition of a collection of objects similar to those on the prints. In a museum or library their use could be controlled.

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ATTORNEY-CLIENT PRIVILEGE

The Wisconsin Supreme Court refuses to give the Wisconsin attorney-client privilege statute as broad an application as the common-law rule, even though the statute has been said to be a "mere re-enactment" thereof. The privilege as limited by the statute, says the Court, extends only to facts communicated directly to an attorney by his client. It does not, therefore, encompass any and all matters which come to the attorney's knowledge in consequence of his employment.

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NAME-CALLING BY EMPLOYEE

The Court of Appeals for the Fifth Circuit has held that a company being organized by a union does not have to submit to name-

calling. It can fire an employee who prepared and signed a letter calling the employer's vice-president "a liar." An employee may be discharged, without violation of the Taft Act, because of what he says or does in the course of organizing a campaign if such conduct exceeds the bounds of legitimate organizing campaign propaganda or is so disrespectful as seriously to impair the maintenance of discipline and thus render the employee unfit for further service.

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FOREIGN DIVORCE SUITS

The New York Supreme Court, Appellate Division, has abandoned the remnants of a rule partially destroyed by the *Williams* cases in deciding that a wife who has obtained a New York separation decree can enjoin her husband from prosecuting a Mexican divorce action even if the Mexican decree would be invalid. Prior to the *Williams* cases New York had held that a divorce suit in a state which had no jurisdiction to render a valid decree was only an annoyance which did not affect the New York resident's rights and consequently did not give rise to a cause of action for an injunction. The *Williams* cases, however, have given other state courts' determinations of jurisdiction prima facie validity. The previous rule, therefore, has been abandoned, but only with regard to divorce suits in other states. Since a Mexican divorce, although invalid, would give the husband "added leverage" in his efforts to pry a valid divorce from his wife, and the foreign decree would be a source of further litigation between the husband and wife and between the two wives after his death, the New York Court has abandoned the old rule even as to divorce suits in foreign countries.

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GOVERNMENT PSYCHIATRIST'S TESTIMONY

The Court of Appeals for the District of Columbia Circuit has ruled that the physician-patient privilege bars an attending Government psychiatrist from testifying in a criminal trial. The fact that the psychiatrist was on the staff of the Government hospital to which the prisoner was committed does not change the result. Examination, however, for testimonial purposes only would not give rise to the privilege for it has nothing to do with treatment. Instead of implying that confidence will be respected, the circumstances imply the contrary.

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THOMAS OWEN MARTIN

Book Reviews

DE CAPITULIS BASILIANORUM. Meletius M. Wojnar, O.S.B.M. Analecta Ordinis S. Basilii Magni, Series II, Vol. III. Sumptibus PP. Basilianorum, Romae, 1954. Pp. vii-202.

One of the more interesting series of publications relative to Oriental Canon Law is the series fostered by the Order of St. Basil the Great. The latest volume in this series is a disquisition on the religious Chapters of the Order.

The Chapters of the Order of St. Basil the Great are divided into general, provincial, and local. The general Chapter has a twofold purpose, elective and ordinary. The author deals in detail with the various aspects of these Chapters considering in turn the power vested in the Chapters, the eligibility of candidates for office, the right to vote, the essential officials required to regulate the business of the Chapter and all other pertinent matters.

For students of comparative Canon Law, this study is of considerable utility. The author presents, in close analysis, especially in elections, the common law of the Church and the particular law of the Order of St. Basil the Great. In this analysis, the student will discover how well since the time of Pope Benedict XIV these two sources of law are integrated.

An appendix contains a chart of the general and provincial Chapters of the Order. The two periods of the Order's existence are properly indicated.

ANALECTA GREGORIANA: QUESTIONI ATTUALI DI DIRITTO CANONICO. Vol. LXIX Series Facultatis Iuris Canonici, Sectio A (n. 4). Apud Aedes Universitatis Gregorianae, Romae, 1955. Pp. viii-496.

The contents of this book were contributions to the celebration of the fourth centenary of the Gregorian University in Rome. A survey of the Code of Canon Law is not attempted but selected points for commentary are included. Considerable space is devoted to moral persons and ample attention is paid to pious foundations, the contract of marriage and administrative and judicial power.

Canonists of merit are contributors to this book. Among these are Michiels, Romita, Onclin, Staffa, Ciprotti, Rodrigo, Moersdorf and Goyeneche. Others of equal importance could be mentioned but those mentioned here are known to every student of Canon Law. Latin, Italian and Spanish are the languages used in this collection of articles.

The longest essay in this collection is written by Michiels. The subject is moral personality as found in its actual determination in the Code of Canon Law. This is an item in which the author is completely at home and his expanded views will be read with interest by canonists.

An article written by Fr. A. Arza of the Society of Jesus should be mentioned. This author is not well known in the United States and future publications under his name should be welcome. Fr. Arza discusses the possibility of applying administratively all penalties not otherwise limited in their method of application. After reviewing various opinions, the author states that such possibility should be admitted. Of course, this question is not definitely settled but Fr. Arza offers several persuasive arguments for his contention.

Perhaps it would be unreasonable to expect an index in a book of this kind. Nonetheless a page or two of the salient points of these articles would be of service to the student.

FOLIA. THE AUGUSTINIAN CONCEPT OF *AUTHORITY*. H. HOHENSEE. Supplement II, Nov. 1954. J. M.-F. M., S.J. Holy Cross College, American Editor. Pp. 77. Price $2.

Perhaps known to too few is an excellent series of studies in St. Augustine under the American editorship of the Jesuits. The second supplement in this series is a compilation of sources in St. Augustine where this great Doctor considers directly or indirectly the concept of authority.

This study is technical research. A general idea of the notion of St. Augustine concerning authority can be obtained from a study of the actual sources printed in this supplement but it will require considerable ability based on thorough training in research to fit these texts into their proper place in the theology of St. Augustine.

The table of contents supplies the student with separate categories for investigation.

The author's summary exegesis on pages 36 and 37 should be read with care. It will furnish a basis for study of the appropriate texts of St. Augustine and determine the initial consideration that ideas of St. Augustine relative to authority underwent changes at different times and periods of his life. These periods are decisive changes from the Manichean rejection of authority to the acceptance of grace as a determining factor in accepting authority.

Naturally, a work such as this will have but a limited appeal. It is to be hoped, however, that further studies in St. Augustine and in the other Fathers of the Church will be published. Thanks are due to the Jesuits of Holy Cross College for their sponsorship of this and other projects of research.

THE JUDICIAL CONTROL OF PUBLIC AUTHORITIES IN ENGLAND AND IN ITALY. By Serio Galeotti, D.Phil., Dr. Jur. (Milan). Stevens & Sons Limited, London, 1954. Pp. x-253.

For some time past there have been occasional appearances in English of books dealing with comparative law. Some of these books have gone through a rather complete comparison between systems of law, others have dealt with separate and detailed points of law. The book under review is in the latter catagory. Its author is an Italian professor of law who had the advantage of studies at Oxford University.

The book opens with a lengthy introduction. Here the outlines of judicial control of public authorities in the English and Italian systems of law are carefullly determined. It is, of course, essential in a study of this kind that the full picture of the topic to be discussed be first seen in its widest view. It would be of little value to plunge immediately into details since these very details are part of the general system and would be almost meaningless unless they could be investigated in their proper prospective.

One of the salient points in the introductory chapter is the discussion of the differences between a " right " and an " interest ". The distinction between these two terms is important and fundamental. Many misunderstandings with consequent chagrin would disappear if the correct relation between these terms were always kept in mind and rigidly observed. As the author says in effect

these terms are not convertible. A "right" is created by law. An "interest" naturally results but not every "interest" has the dignity of a "right". It is clear, for instance, that every one has an interest in proper administration but not every one has a right to have a defect of administration corrected when individual rights are violated.

After this excellent introduction, the author considers in turn the organization, methods, extent, intensity, nature, procedural and practical aspects of judicial control.

The conclusions of the author deserve attention. He is articulate in describing the scrupulous conduct of administration in the English systems of law which aims to prevent maladministration before judicial control can rectify malpractice. The author is likewise articulate in asserting the advantage of the immediate possibility in the Italian system of law of correcting the errors and violations of administrators. On the whole, the author prefers the Italian method of judicial control of public authorities. The principal reason is that should an error occur it can be more promptly corrected in the Italian system of law.

A selected bibliography of English, American and Italian books is provided. There is no index but the detailed table of contents is serviceable. Students of comparative law will find this book of absorbing interest.

FIFTH SYNOD OF THE ARCHDIOCESE OF CINCINNATI celebrated December 14, 1954 by His Grace, The Most Reverend Karl J. Alter, D.D., LL.D., Archbishop of Cincinnati. St. Anthony Guild Press, Peterson, New Jersey. Pp. xxxiii-221.

The fifth Synod of the Archdiocese of Cincinnati is the latest of the growing number of Synods in the United States. The statutes of this Synod are written in English and contain only the minimum of textual citation of the Code of Canon Law. Difference of opinion may exist in regard to the use of the English language but the compilers of these statutes, under the instruction of their Ordinary, must be commended in restricting themselves as carefully to legislation not verbally contained in the general law of the Code or in the conciliar law of Baltimore.

There are several statutes worthy of special mention. The first is the humane way in which sermons and public addresses are

placed under examination by the Ordinary. There is no specific command to submit such sermons and public addresses to the Ordinary but the latter protects his authority and the public good by asserting his right and obligation whenever he feels that an examination of these sermons and addresses is necessary. This is the humane way of dealing with a delicate subject. Consorship is not imposed either by decree or statute but nonetheless the principle of authority is adequately protected. By inference, at least, proper confidence is exhibited in the integrity, prudence, competence and zeal of the clergy, secular and religious.

Several statutes consider mass intentions. The fifth Synod of Cincinnati determines, in regard to Purgatorial Societies, that high Masses are to be celebrated according to the archdiocesan schedule of stipends. Further, in the matter of Mass bequests, unless otherwise specified high Masses are to be sung. These statutes are welcome for the certainty they establish where indecision and doubt are frequently found.

A statute relative to application for tax exemption is, in a footnote, considered to be a matter of public order and, therefore, binding on all, subjects and non-subjects alike. There can be no quarrel with the content of this statute (no. 272) but the reason assigned (possibility of individual blunder) is scarcely a proper support for a law of public order.

There are two points in this Synod which do not, at least at first sight, agree with the spirit of the Code of Canon Law. One is the requirement that a priest be included among the executors of a priest's will. Aside from the civil right of the testator to choose freely his own executors, no cleric according to canon 139, § 3 of the Code of Canon Law should accept a secular duty which demands a report to authorities. The Code demands permission of the Ordinary before such a duty may be assumed. Perhaps the Synod intends to grant such permission but the fact remains that the spirit of the Code prefers that such secular duties be avoided. The other point which should be clarified is the condemnation of a sliding scale of charges for different types of ornamentation furnished by the parish in the matter of funerals. If this means that different classes of funerals are condemned, the Synod is not in agreement with the spirit of canon 1234 of the Code of Canon Law. In this canon, it is assumed that different classes of funerals

are permitted and, of course, inferentially recognized as legitimate with the injunction that where these classes exist free choice is given to the one arranging the funeral.

There are many appendices to the statutes of this Synod. They correspond to the order of the statutes. A serviceable index is provided.

EDWARD ROELKER

PRECEPTS. By Edward Roelker, S.T.D., J.C.D. St. Anthony Guild Press, Paterson, New Jersey. 1955. Pp. xii-251.

This volume is the second to make its appearance this year under the authorship of Monsignor Roelker. Its subject matter deals with canon 24 of the Code of Canon Law, on Precepts, as the basis of its development. Of course, the operative implications and effects of this canon are very extensive; it is the burden of this work to treat this topic in its many and varied aspects and details. The reading of the first two chapters of this treatise may be burdensome. If so, this result is not attributable to the author. They discuss the fundamental concepts concerning and related to the notion of precept, and as such these are a necessary, preparatory introduction to the proper development and understanding of the subject matter. The remaining twelve chapters should stimulate interest without much effort.

It will not be necessary to review this volume chapter for chapter, in order to announce in general its content and scope. It contains studies on the origin, nature, author, subject, subject matter, purpose, application, function, effect, obligation, extent, cessation, of precept in every form of ecclesiastical government. The work explains how legislative, judicial, jurisdictional administrative and coercive powers are effectuated in particular instances by means of precept. Precept is an authoritative implementation of these major powers in the execution of the law. Dominative power is considered and explained along similar lines.

The author does not admit the existence of a common precept as distinct from a law. According to his doctrine, precepts are exclusively particular and personal; they bespeak the direct relationship between superior and subject in concrete, practical matters. Special circumstances, particular, concrete cases will arise from

time to time respecting the individual subject and his obligation under or his relation to the law, which necessitate the employment of the precept appropriate to the occasion. In other words, the book illustrates at length and in detail ecclesiastical government in action, either through jurisdictional or dominative power, by the agency of precept in contrast to government by legislation.

The discussions and explanations proceed clearly and logically. The author leaves no doubt as to what he means by his statements, and, with few exceptions, why he says so, though one may in given instances strongly disagree with his propositions and conclusions. But in this latter event, at least a precise issue or question is brought into focus in the mind of the reader.

The precept, both jurisdictional and dominative, is considered under the aspects of honesty, justice, and possibility of fulfillment. These questions are fundamental. In this connection the author explains the doctrine on the employment of ecclesiastical authority and control in respect to the subject's use of his rights which are non-ecclesiastical in view, however, of spiritual consequences involved. Ample space is given to the penal precept. This particular treatise reports the controversy on the reservation of censures deriving from precept, with the difficulty centering in can. 2245. However, one may add that perhaps a more fundamental difficulty lies with the proper and adequate understanding of can. 2217. It is the impression of the reviewer that the author engages in the encounter as a spectator rather than an ardent participant. Recourse in respect to the question of its suspensive or non-suspensive effect is treated rather summarily; the indication of legal sources and bibliography in this matter would, it seems, have improved the treatment.

For the beginner this volume is decidedly useful as introduction and orientation in the field of positive ecclesiastical law, for the author frequently and properly descends to an elementary level for the sake of clarity. The beginner's appreciation of the various studies will grow in proportion to the increase of his knowledge of the principles of canon law and the canons of the Code. For one who is familiar with the field of canon law, this treatise may be fruitfully employed at least for the purpose of integration of his knowledge in regard to its application.

These studies on the various aspects and types of precept as indicated in the foregoing present a treatment of this subject matter in a unity and coherence which is new and as such a valuable contribution to canonical literature. There is a well organized table of contents. An adequate apparatus of Reference Notes, bibliography, and index are at the close of the volume.

J. SCHMIDT

INTERRITUAL CANON LAW PROBLEMS IN THE UNITED STATES AND CANADA. By Victor J. Pospishil, St. Basil's, Chesapeake City, Maryland, 1955. Pp. 248.

The student of Canon Law as well as the priest engaged in the care of souls will certainly be hopeful at the sight of the title of this book. Both will readily admit the current need for a practical manual on interritual problems. As the author states in his Foreword, this volume is intended to meet the need by "placing into the hands of chancery officials and parish priests a manual which would aid them in solving problems involving either Oriental Catholics alone, or Oriental Rite and Latin Rite Catholics . . . ." The author further states: "Written solely for practise, this book has no scholarly ambition . . . ."

A wide field of material ranging from the notion of the word rite to a translation of the most recent papal documents regarding Oriental rites is covered in this volume. To mention some of the topics discussed: Acquisition and Change of Rite; Clergy; Worship; Sacred Places; Sacred Times; Sacramentals; Sacraments; Dispensation from Matrimonial Impediments; The Essential Matrimonial Form for Catholic Orientals; The Extraordinary Marriage Form; and the Liturgical Form of the Wedding. Much useful information has been made available for ready consultation in the presentation of these topics. For that the author deserves credit. Likewise he should win our appreciation for pioneering in so vast a field with an attempt to offer a practical manual.

The author's purpose of presenting a volume with *no scholarly ambition* has burdened his work with notable shortcomings. Anyone confronted with an interritual problem knows that a critical approach to the solution is needful. The author's dismissal of

such problems, therefore, without benefit of documentation does not engender the confidence one desires when facing actual cases. It is to be regretted that the author did not appreciate the reader's interest in sources in such matters as a transfer of rite or the validity of a marriage. In a field where discussions so frequently and readily occur, the citation of authoritative sources would certainly have enhanced the value of the volume.

Attention must be called to a few matters where the need for documentation is absolutely necessary to uphold the opinions presented. This is particularly true regarding the author's division of rites in the Oriental Church, since the opinion expressed has ramifications in various parts of the book. On pages 12-13, the author practically reduces the total number of Oriental Rites with which we are familiar to five rites, despite the fact that canon 303, § 1, of the Motu Proprio "*Postquam Apostolicis*" expressly speaks of *other rites* which the Church expressly or tacitly recognizes as *sui iuris*. He then proceeds to classify such groups as the Coptic, Ethiopic, Maronite, and Syrian "Rites" (*sic*) as *disciplines* actually contained within the five original Oriental rites. It should be stated whether this concept of *discipline* is a concept recognized by any Oriental authorities or a concept of the author alone. Since this classification of rites may have profound influence upon the judgment regarding the validity of certain marriages or upon the validity of assistance at certain marriages, it seems imperative that the author should have offered documentation for his contention which actually denies juridical existence (as rites) to groups classified as *disciplines*. Following his classification of rites, the author concludes on page 46 that a Syrian Catholic may transfer to the Maronite Rite without permission of the Holy See since such a transfer is merely a transfer from one discipline to another within the same rite, even though the one rite uses leavened bread and the other uses unleavened bread in the Eucharistic Sacrifice. Here, again, documentation for such a view seems necessary. On page 127, the author lists the Rumanians, Melchites, and Ruthenians as members of the same rite and then he draws particular conclusions from this classification. The reviewer cannot agree with these opinions in view of recent writings upon the *Motu Proprio*. (Cf. Herman, "De Motu Proprio 'Postquam Apostolicis'", *Monitor Ecclesiasticus*, 1952, p. 259).

A minor point, in so far as it does not touch upon the real issue of interritual problems, is the statement on page 76 that *epicheia* is a matter of presumed dispensation. The two concepts are not equivalent in law. Dispensation is an act of jurisdiction, whereas *epicheia* is a judgment based on the presumption that the legislator did not intend the inclusion of the particular matter within the law.

A satisfactory index and bibliography and a detailed table of contents are good features of this manual. It should be mentioned, however, that various typographical and grammatical errors detract from one's general appreciation of the volume.

In the Foreword the author solicits corrections or emendations from his readers and it is, therefore, in view of further editions of this volume that the above observations are made.

Romaeus W. O'Brien, O.Carm.

Chronicle

DIGNITIES

The Very Rev. Angelus Delahunt, S.A., has been elected to a six-year term as General Superior of the Atonement Fathers.

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Monsignor Joseph Brady of the Newark Archdiocese has been named rector of the seminary for the Archdiocese.

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The Rev. Joseph Higgins, M.S., has been appointed Provincial Superior of the Province of Our Lady of the Seven Dolors of the La Salette Fathers.

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Monsignor Joseph Emmenegger has been named Superior of the Casa Santa Maria, the new residence hall for student priests at the North American College in Rome.

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Five priests of the diocese of Raleigh, North Carolina, have been named Domestic Prelates by His Holiness. The new Right Reverend Monsignors are: Charles C. Gable; Edward Gilbert; John Rouche; Michael Begley, and Herbert Harkins.

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Mr. Eugene Willging, director of the Library at The Catholic University of America, was named a Knight of the Equestrian Order of the Holy Sepulchre of Jerusalem.

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Bishop John P. Cody has been named Apostolic Administrator of the diocese of St. Joseph, in view of the illness of Bishop Le Blond.

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The Reverends John J. Byrnes, Joseph R. Lacy, and John S. Kennedy, priests of the Archdiocese of Hartford, have been elevated to the rank of Domestic Prelates by the Holy Father.

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Four new Domestic Prelates have been named for the diocese of Providence. The priests who have just received this honor are: Rev. Patrick S. Canning; Rev. Matthew F. Clarke; Rev. William F. Ferry; and the Rev. Moise Leprohon.

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Monsignor Augustine Mozier, Vicar General of the diocese of Camden, has been named a Protonotary Apostolic.

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Fifteen priests of the diocese of Lincoln have been named Domestic Prelates. They are: the Reverends Daniel Cooper; Clarence Crowley; Howard Hart; Henry Ingenhorst; Mitchell Kaczmarek; John Kean; Charles Keenan; August Kraemer; Alphonse Lisko; William Murphy; Jerome Pokorny; William Rezabek; Francis Sherman; Joseph Tupy; and Sylvester Wagner. Two priests of the diocese, the Reverends Jerome Murray and Adam J. Szmydt, have been named papal chamberlains.

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Twelve Pittsburgh priests have been honored with the title Domestic Prelate. The newly-created Right Reverend Monsignors are: Anthony Benedik; William Connare; James Davin; Thomas Henninger; Carl Hensler; Henry Immekus; Joseph Kushner; Francis McCarter; Philip Moore; Edward J. Moriarity; Leo Pastorius; and Vincent Rieland. The Reverends Paul Coyle, Joseph Keener, and Jacob Shinar, also priests of the Pittsburgh diocese, have been named papal chamberlains.

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The Right Reverends Dennis Kane and Connel McHugh of the diocese of Scranton have been named Protonotaries Apostolic.

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Eight priests of the Archdiocese of New York have been honored by Pope Pius XII. The Right Reverend B. Filitti was named a Protonotary Apostolic and the Reverends James Boyle, Christopher Dunleavy, James Jones, Vincent Raith, and Peter Turby were named Domestic Prelates. The Reverends George Guilfoyle and James Wilders were named papal chamberlains.

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The Reverend Peter J. McGarrity of the Archdiocese of Philadelphia was named a Domestic Prelate by His Holiness.

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Seventeen priests of the diocese of Albany were honored by His Holiness with elevation to the rank of Domestic Prelate. They are: the Right Reverends Michael Bianco; Daniel Burns; John Finn; Joseph Franklin; George Gratton; James Hanrahan; William Keane; J. Kelly; Joseph Kelly; Arthur Kiffin; Thomas Loughlin; James Nolan; William Noonan; Peter Nowak; Leo Schmidt; William Taafe; and Edward Walsh.

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Six priests of the diocese of Norwich have been named Domestic Prelates. They are: the Right Reverends Frederick DesSuveaulty; Alfred Driscoll; Donat Jette; John McGrath; Ladislaus Nowakowski; and John Quinn.

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Three priests of the diocese of Tucson have been named Domestic Prelates. They are: the Right Reverends Francis Donnellan; Bernard Gordon, and Donald Hughes.

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Monsignor Joseph Brunini, Vicar General of the diocese of Natchez, was elected president for the coming year of the Catholic Hospital Association of the United States and Canada.

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Auxiliary Bishop Justin McCarthy of Newark received the honorary degree of doctor of laws at the 64th commencement of St. Peter's College, Jersey City.

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The Rev. Thomas J. Cronin of Cambridge, Massachusetts, has been appointed Superior of the Columban Missionaries in the Island of Negros.

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Auxiliary Bishop Edmund J. Reilly of Brooklyn was consecrated Bishop on June 7.

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The first diocesan synod in the eighteen year history of the diocese of Camden was held under the leadership of Bishop Eustace.

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The Catholic University of America has been put on the approved list of American Universities offering training courses in counselling and clinical psychology.

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Commencement exercises were held on June 7 at The Catholic University of America. Honorary degrees were given to the Hon. John J. Hearne, Ireland's Ambassador to the United States; to Mr. Eugene Butler, director of the legal department of the N.C.W.C.; to Mr. Lewis L. Guarnieri, a member of the University's Board of Trustees; and to the Hon. John Brosnan, Regent of the University of the State of New York.

ROMAEUS W. O'BRIEN, O.Carm.